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Nos. 366 and 384

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

INTERSTATE COMMERCE COMMISSION, *Appellant*

v.

J-T TRANSPORT COMPANY, INC., ET AL., *Appellees*

U.S.A.C. TRANSPORT, INC., ET AL., *Appellants*

v.

J-T TRANSPORT COMPANY, INC., ET AL., *Appellees*

On Appeals From the United States District Court for the Western District of Missouri—Western Division

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MOTION TO AFFIRM

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January 5, 1960

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 563

INTERSTATE COMMERCE COMMISSION, *Appellant*

v.

J-T TRANSPORT COMPANY, INC., ET AL., *Appellees*

No. 564

U.S.A.C. TRANSPORT, INC., ET AL., *Appellants*

v.

J-T TRANSPORT COMPANY, INC., ET AL., *Appellees*

On Appeals From the United States District Court for the Western District of Missouri—Western Division

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MOTION TO AFFIRM

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, the Contract Carrier Conference of American Trucking Associations, Inc., an appellee in the above entitled case, moves that the final judgment and decree of the District Court be affirmed on the ground

that the questions are so unsubstantial as not to warrant further argument.

STATEMENT

This is a direct appeal from the final judgment and decree entered August 9, 1960, by a District Court of three judges specially constituted pursuant to 28 U.S.C. 2284 and 2325, setting aside certain orders of the Interstate Commerce Commission as being unlawful and void.

The case arises from an application filed March 14, 1957 by J-T Transport Company, Inc. (J-T), its Docket No. MC-11185 (Sub No. 102), in which the carrier sought a permit authorizing operations, in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes, of aircraft assemblies, uncrated, requiring special handling and special equipment because of their fragile nature, from Indianapolis, Ind., to Wichita, Kans. The application was the subject of a hearing before a duly appointed hearing examiner of the Commission, who recommended that the application be granted. However, by a report decided January 31, 1958, and reported at 74 M.C.C. 324, the Commission, Division 1, denied the application. Petitions for reconsideration and for oral argument were filed by the applicant. The Contract Carrier Conference of American Trucking Associations, Inc., filed a petition for leave to intervene, and for reconsideration or further hearing. The Conference was permitted to intervene, as were certain other conferences of American Trucking Associations, Inc. However, all petitions for reconsideration, oral argument, or further hearing were denied. At this point J-T filed a complaint in the United States District Court for the Western District of Missouri asking that the Commission's order be set aside. Before the cause came on to be heard, the Commission issued a report in another contract carrier case which appeared to be in conflict with its denial of the authority sought by J-T. J-T then decided to again seek reconsideration of its case

before the Commission and was permitted to take a voluntary nonsuit, without prejudice, in its first complaint. The Commission, as a result of the second petition, did reopen the proceeding for reconsideration, but by its report and order of June 15, 1959, denied the application. The Commission's denial of the application was based on the mere existence and availability of a common carrier allegedly willing and able to provide the service sought, although it had not been handling the traffic involved. As a result of this denial, J-T brought this action to determine the validity of the Commission's orders. The decision of the District Court setting aside the Commission's orders is reported at 185 F. Supp. 838.

ARGUMENT

The decision of the District Court is plainly correct and should be affirmed.

The first issue raised by appellants is whether and to what extent the Commission may consider the existence of common carriers who profess to be able and willing to provide the type of service for which a need has been shown. In 1957 certain amendments were made to the Interstate Commerce Act. Prior to these amendments Section 209(b) of that Act authorized the issuance of a permit to a contract carrier upon a finding that the proposed operation would be consistent with the public interest and the national transportation policy. The 1957 amendments added the following language:

> "In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements."

The Commission had initially proposed that Section 209(b) be amended to provide that a contract carrier permit could be issued only upon a showing "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown."[1] This proposal encountered the opposition not only of the contract carriers and their shippers, but also of the Department of Justice and the Department of Commerce. This opposition was expressed in the form of a letter to Senator Magnuson from the Honorable William P. Rogers, then Deputy Attorney General, and through the testimony of the Honorable Louis S. Rothschild, Under Secretary for Transportation, Department of Commerce. It appears as a part of the record of the 1957 hearings before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 1st Sess., entitled *Surface Transportation—Scope of Authority of I.C.C.* (pp. 11, 200-203). The Commission itself finally agreed to deletion of the disputed language on the stated ground that it would impose a very difficult burden of proof on applicants. Congress therefore rejected this language and instead set up the previously quoted criteria for determining under what circumstances issuance of a contract carrier permit would be consistent with the public interest and the national transportation policy.

In its first assignment of error the Commission adopts as a premise that the District Court held that Congress intended to require the Commission to grant a motor contract carrier permit "without regard" to the fact that existing motor common carriers are able and willing to provide adequate service to the shipper. The Commission's argument relative to this assignment, does not in fact support the assignment of error, but rather deals with certain

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[1] This was not a new proposal by the Commission. It was first recommended to Congress in the 69th Annual Report of The Interstate Commerce Commission (1955) pp. 132-133, and repeated in the Commission's 70th Annual Report (1956) pp. 162, 163.

aspects of the burden of proof. More important, however, the District Court's holding is not as broad as the Commission appears to believe. The Court did not hold that a contract carrier permit should be issued "without regard" to existing services. Rather it held that the mere existence or availability of common carrier service was not controlling, and that it was necessary to determine what effect, if any, granting a permit would have on the existing services of those carriers. Stated accurately, the question should be "Did the Court err in holding that by the 1957 amendments to the Act, Congress intended the Commission to consider the possible adverse effect which the granting of a permit would have on the services of existing carriers, rather than to base its decision on a mere determination that existing common carriers are able and willing to provide the service. So stated, this question must be answered in the negative. The legislative history discloses a rejection of the "able and willing" test, and the language of the statute itself makes the controlling criterion here the effect of the granting of a permit on the services of existing carriers. The District Court clearly perceived this and committed no error.

Appellants also misconceive the nature of the District Court's holding in their second assignment of error. The Court did not hold that a determination of the effect which granting a permit would have on the services of protesting carriers relates only to diversion of traffic from a carrier presently serving the affected shipper, and excludes consideration of the loss of potential traffic. What the Court did find was that the Commission erred in basing its decision on the *presumption* that if an existing common carrier is able and willing to perform services for the shipper, the effect on existing common carrier services is adverse. The Court points out that an adverse effect of granting the application on the services of protesting carriers would normally come about from diversion of traffic which the carrier was actually handling; and that

where the protesting carrier is not participating in the traffic, there can be no diversion and hence "ordinarily" there would be no adverse effect on the carrier's service. The Court does not say that under *no* circumstances could there be an adverse effect from the loss of potential traffic nor does it completely rule out a consideration of this factor. What the Court does say is that *ordinarily* there will be no adverse effect on the services of protesting carriers through loss of potential traffic, and that the Commission is in error in establishing a presumption to the contrary.[2] In aiding itself by this presumption the Commission, in effect, injects precisely the standard which was deleted by Congress, and this was recognized by the District Court.

Appellants pose as their third question whether the Court erred in concluding that the Commission had placed upon applicant the burden of proving the services of existing carriers inadequate. This precise point is never developed, though the contention appears to be that the Commission should be allowed to consider the adequacy of existing common carrier service. This appears to be an outgrowth of the position taken by the Commission before the District Court. There, it apparently conceded that it could no longer deny a contract carrier application upon the ground that applicant has failed to sustain the burden of proving that common carriers are "unwilling or unable" to perform the proposed service, but contended that it is proper to consider the "adequacy of existing services". There is, however, no practical distinction between these tests.

In order for a carrier's service to be adequate, the carrier must first be willing to handle the traffic. In addi-

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[2] In this connection the District Court stated that "there is in this record no substantial evidence to support the Commission's finding that the issuance of the permit would adversely affect the *services* of U.S.A.C. which had never handled or transported the commodities in question." (Emphasis is the District Court's).

tion, however, it must also be *able* to handle the traffic to the satisfaction of the shipper. If a carrier is *willing* to handle the traffic, and is *able* to handle it in such a way as to satisfy the shipper's requirements, then its service may be said to be adequate. Conversely, if a carrier is unwilling to handle the traffic, or is unable to handle it in such a way as to satisfy the shipper's requirements, then obviously its service is inadequate. Adequacy, as used by the Commission, is a term embracing either willingness or ability or both. Over the years, the Commission has used these terms interchangeably, as is illustrated by the decisions reviewed and discussed in the District Court's opinion. The Court concluded, correctly we believe, that there was no practical distinction between the tests; and that to the extent applicant had been required to show the protesting common carriers were unable or unwilling to meet the shipper's requirements the standard was not supported by the language of Section 209(b) whether under the guise of an "adequacy" test or otherwise.

The Commission now suggests that adequacy of service is pertinent in determining the effect of a denial upon the shipper—a factor which the Commission must consider. However, as the District Court points out, this provision quite obviously was inserted to protect the shipper and the applicant, and to insure that their interests would receive the same consideration and be weighed in the same balance as those of opposing carriers. This criterion cannot be used as a means of distorting or evading the expressed statutory considerations.

In the 1957 amendments to Section 209(b) of the Interstate Commerce Act, Congress specifically directed the Commission to consider 5 factors in determining whether or not issuance of a permit would be consistent with the public interest and the national transportation policy. Prior to that time the Commission had no statutory standards to guide it in making this ultimate determination.

Lacking any such guides, the Commission had developed certain policies, or at least attitudes, aimed at restricting the issuance of new contract carrier permits. The Commission felt that this was necessary because it could not limit the number of shippers which a contract carrier could serve and hence could not control the activities of these carriers once they secured a permit. During this period, the willingness and ability, or adequacy test was developed. However, the 1957 amendments did give the Commission power to limit the services of contract carriers to a particular shipper, and the Commission now regularly does so. Since a contract carrier was thereby effectively precluded from expanding its activities to the point of serving the general public, the Commission's prior reasoning became inappropriate and other guides were needed. Congress recognized this by enumerating the standards presently found in Section 209(b). In commenting on this on the floor of the Senate, Senator Smathers, Chairman of the Subcommittee which conducted the hearings on the proposed legislation stated, 103 Cong. Rec. 14035-36 (1957):

> "This section [209 (b)] is also amended by adding a new sentence providing that hereafter the Commission, in passing upon new permits, shall consider the number of shippers to be served, the nature of the service proposed, the effect which granting the permit would have upon protesting carriers and the effect which denying it would have upon the applicant and its shipper. In this, *the Committee is proposing to give the Commission more helpful standards than are contained in the present law.*" (Emphasis added.)

The language of the statute directs the Commission to consider 5 factors and only 5 factors. Had Congress intended other factors to be considered, it undoubtedly would have so specified, and in interpreting the statute, the principle of inclusio unius est exclusio alterius should apply. As was stated in *Knapp-Monarch Co.* v. *Commis-*

sioner of Internal Revenue, 139 F. 2d 863, 864 (8th Cir. 1944):

> "The very fact that Congress has provided a way in which the Internal Revenue Department may bind itself, precludes the possibility of its being bound by some other procedure. 'When a statute limits a thing to be done in a particular mode it includes the negative of any other mode. *Raleigh, etc. R. Co.* v. *Reid*, 13 Wall. 269, 270, 20 L. Ed. 570; *Scott* v. *Ford*, 52 Or. 288, 296, 97 P. 99.' *Botany Worsted Mills* v. *United States*, 278 U.S. 282, 49 S. Ct. 129, 132. See also *McIlhenny, et al.* v. *Commissioner*, 3 Cir., 39 F. 2d 356."

To the same effect is *Lukens Steel Co.* v. *Perkins*, 107 F. 2d 627 (D. C. Cir. 1939), *rev'd on other grounds*, 310 U.S. 113, 60 S. Ct. 869 (1940), where the Court of Appeals stated (107 F. 2d 640):

> "A statute, by prescribing the conditions and limitations which properly may be imposed upon one who seeks to enjoy a right, prohibits the denial of the right upon other grounds."

Thus it is our position that the Commission is confined to consideration of the five criteria set forth in Section 209 (b) of the Act. This does not mean, as certain appellants suggest, that the Commission cannot consider an applicant's fitness, willingness or ability, for, under the specific language of Section 209 (b), applicant must appear to be fit, willing and able properly to perform the proposed service. The five specified criteria apply in determining whether issuance of a permit will be consistent with the public interest and the national transportation policy. Actually, these criteria include the very factors which the Commission would normally want to consider in a contract carrier application, and the Commission acquiesced in their adoption by Congress. As the Court below found, the criteria are broad and inclusive, and when given proper application, in the light of the evidence, the Commission

should, without the injection of other factors, be able to make a proper disposition of the application. The Court has correctly interpreted the statute, and given the Commission sufficient guide as to the scope of its permissible action.

The 1957 amendments to the Interstate Commerce Act actually grew out of this Court's decision in *United States* v. *Contract Steel Carriers*, 350 U.S. 409, 76 S. Ct. 461 (1956). Since this decision was not in accord with the Commission's prior thinking, it suggested certain legislative measures to Congress. The Commission's proposals were not altogether acceptable, and the legislation as finally adopted represents a compromise of sometimes conflicting views. The purpose of the amendments was to supply a more positive statutory guide to the Commission than then existed, and to make readily possible clearer distinctions as between motor common and contract carriers. See Sen. Rep. No. 703, 85th Cong., 1st Sess., p. 3 (1957). To this end, the definition of contract carriage was changed by amending Section 203 (a) (15) of the Act. Amendments to Section 209 (b) gave the Commission power to limit contract carrier service to a specific shipper, and set up the criteria here under consideration. Rejected by Congress was the proposal that a contract carrier permit could be issued only upon a showing "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown."

Although the legislation involved is important, the questions presented are not so substantial as to warrant further consideration by this Court. In amending the Act Congress expressed itself clearly and set forth definite and reasonably precise guides for the Commission. Instead of following these guides, the Commission has attempted to interject other tests into the determination of contract carrier applications—tests nowhere authorized by statute nor supported by legislative history, and in fact rejected by Con-

gress. The District Court has recognized this fact. It has interpreted the relevant portions of the statute involved in accordance with well established principles of statutory construction. In our opinion no novel or unusual questions are presented to this Court, such as would require further oral argument.

We respectfully submit therefore, that the decision below is correct, and that appellants present no substantial question for the decision of this Court. The judgment and decree of the District Court should accordingly be affirmed.

Respectfully submitted,

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January 5, 1960

Certificate of Service

I, Clarence D. Todd, one of the attorneys for appellee Contract Carrier Conference of American Trucking Associations, Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 5th day of January, 1961, I served copies of the foregoing Motion to Affirm on the several parties as follows:

1. On the United States by mailing copies in duly addressed envelopes with first class postage prepaid to Hon. J. Lee Rankin, The Solicitor General, Department of Justice, Washington 25, D. C., Robert A. Bicks, Acting Assistant Attorney General, Department of Justice, Washington 25, D. C., John H. D. Wigger, Attorney, Department of Justice, Washington 25, D. C. and to Edward L. Scheufler, United States Attorney, Kansas City, Mo., with air mail postage prepaid.

2. On the Interstate Commerce Commission by mailing copies in duly addressed envelopes with first class postage prepaid to Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington 25, D. C., and James Y. Piper, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.

3. On other appellants herein, by mailing copies in duly addressed envelopes, with first class postage prepaid, to their respective attorneys of record as follows:

To Roland Rice, Esq., 618 Perpetual Building, 1111 E Street, N.W., Washington 4, D. C., Attorney for Regular Common Carrier Conference of American Trucking Associations, Inc.

To James E. Wilson, Esq., 716 Perpetual Building, 1111 E Street, N.W., Washington 4, D. C., Attorney for Common Carrier Conference—Irregular Route, of American Trucking Associations, Inc.

To Paul F. Sullivan, Esq., 1821 Jefferson Place, N.W., Washington 6, D. C., Attorney for U.S.A.C. Transport, Inc.

4. On J-T Transport Company, Inc., appellee herein, by mailing copies in duly addressed envelopes, with air mail postage prepaid to James W. Wrape, Esq., and Glenn M. Elliott, Esq., Wrape and Hernly, 2111 Sterick Building, Memphis, Tenn., and to John E. Park, Esq., 1007 Bryant Building, Kansas City, Missouri, its attorneys.

5. On Aerospace Industries Association of America, Inc., by mailing copies in duly addressed envelopes, with air mail postage prepaid to John H. Kreamer, Esq., 1007 Bryant Building, Kansas City, Missouri, its attorney.

CLARENCE D. TODD

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SUPREME COURT, U. S.

Nos. 563 and 564

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v.

J-T TRANSPORT COMPANY, INC., ET AL.

U.S.A.C. TRANSPORT, INC., ET AL., *Appellants*

v.

J-T TRANSPORT COMPANY, INC., ET AL.

On Appeals From the United States District Court for the Western District of Missouri

MOTION OF J-T TRANSPORT COMPANY, INC. TO DISMISS OR AFFIRM

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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INTERSTATE COMMERCE COMMISSION, *Appellant*

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On Appeals From the United States District Court for the Western District of Missouri

---

MOTION OF J-T TRANSPORT COMPANY, INC. TO DISMISS OR AFFIRM

Comes J-T Transport Company, Inc., appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, and respectfully moves the court to dismiss the appeals herein or, in the alternative, to affirm the judgment of the lower court upon the following grounds:

1. It is manifest that the questions on which decision of the cause depends are so unsubstantial as not to need further argument.

2. Appellants here seek, as they did before the court below, to have the court by judicial legislation invest the Interstate Commerce Commission with power denied to it by Congress, and to permit the Commission to do indirectly that which it cannot do directly under statutory authority.

3. It is obvious that appellants, in posing their alleged "Questions Presented", stretch the implications of the decision below to unjustified reaches, thereby resorting to the familiar expedient of setting up straw men solely for the purpose of knocking them down.

4. The only question presented is whether the Commission may deny an application for a contract motor carrier permit solely by virtue of adding to the five tests set forth in sec. 209(b) of the Interstate Commerce Act, 49 U.S.C. sec. 309(b), a sixth test, i.e., that an applicant must assume and carry the burden of establishing that a motor common carrier, as a *common carrier,* was unwilling or unable to perform the included transportation as a common carrier. The Congress in 1957 denied the Commission authority to impose such sixth test, and the lower court correctly so held. No other question is presented. Review of the legislative history of the amendments of 1957 to sections 203(a)(15) and 209(b) of the Interstate Commerce Act, 49 U.S.C. secs. 303(a)(15) and 309(b), establishes that no further argument is necessary.

STATEMENT OF THE CASE

This action was instituted in the United States District Court for the Western District of Missouri to enjoin, annul and set aside orders of the Interstate Commerce Commission, hereinafter referred to as the Commission, and to compel action by the Commission unlawfully withheld upon the application of J-T Transport Company, Inc., hereinafter referred to as J-T, for a permit to operate, as a contract carrier by motor vehicle, over irregular routes, of unerated landing gear bulkheads requiring special handling and equipment because of their fragile nature, from Indianapolis, Indiana, to Wichita, Kansas. Such application was filed by J-T with the Commission on March 14, 1957, and assigned docket No. MC-11185, Sub 102.

J-T for a number of years has been engaged, pursuant to authority of the Commission, in the transportation, as a contract carrier by motor vehicle, over irregular routes, of unerated airplane parts and equipment requiring special handling and equipment, between a number of points in the west and midwest, and in so doing has conducted a very substantial operation and made material contribution to the National Defense effort in providing a highly specialized motor carrier service to manufacturers of aircraft for the United States government, tailored to meet the distinct transportation needs of such manufacturers.

On August 5, 1957, upon application of J-T and with the support of Boeing Airplane Company, the Commission, after full investigation and a finding that there was an immediate and urgent need for the service proposed by J-T, and that there was no carrier service capable of meeting such need, pursuant to

authority in it vested by sec. 210a(a) of the Interstate Commerce Act, hereinafter referred to as the Act (49 U.S.C. 310a(a)), granted to J-T temporary authority to perform the transportation for which permanent authority was sought, and from such time plaintiff has been and is engaged in performing a needed and satisfactory transportation service for Boeing Airplane Company in transporting landing gear bulkheads from the point of manufacture in Indianapolis to the plant of Boeing in Wichita, where they are delivered on such timed schedule as to permit them to be incorporated in aircraft being produced for the United States government on a production-line basis.

The application of J-T for permanent authority was duly heard by an experienced examiner of the Commission on May 22, 1957. At that time affected railroads, a number of motor common carriers designated as "heavy haulers", and one specialized motor common carrier intervened in opposition. Following the undisputed evidence with respect to the type of commodity to be transported and the highly specialized transportation service required by the shipper the "heavy haulers" did not persist in their opposition. The objection of the railroads was to the original commodity description, which objection was satisfied by amendment thereof, as appears of record.

It results, therefore, that the only motor carrier opposing plaintiff's application is U.S.A.C. Transport, Inc., one of the appellants, a motor *common carrier*, which holds authority to operate, over irregular routes, in the transportation of aircraft parts, crated or uncrated, restricted to parts requiring special equipment or handling by reason of size, weight or fragile character. Under such authority this car-

rier proposes, as a *common carrier*, and within the limitation of its tariff restrictions as to dedication of equipment to the exclusive use of the shipper, and by providing the necessary special equipment, to perform the transportation as a *common carrier* which J-T proposes to perform as a contract carrier, but such common carrier has never participated in performing the involved transportation, and the record does not establish that, irrespective of the outcome of this litigation, the shipper would ever entrust to the common carrier the handling of its fragile and expensive commodities. The record does establish that the motor common carrier service of U.S.A.C. Transport, Inc. would not meet the transportation needs of the shipper.

On July 18, 1957, the examiner filed his recommended report and order wherein he found that the operation proposed by J-T would be consistent with the public interest and the National Transportation Policy as enunciated by Congress (49 U.S.C., preceding secs. 1, 301, 901, and 1001), and that a permit authorizing such operation should be granted. The examiner incorporated in his report a comprehensive and carefully prepared statement of facts which statement, in that same was subsequently adopted by the Commission, is entitled to careful consideration. It is attached as Appendix "A" hereto.

Exceptions to the examiner's recommended report and order were duly filed by U.S.A.C. Transport, Inc., and answered by J-T. On January 31, 1958, Division 1 of the Commission handed down a report and order embodying in one report its action on two separate applications heard on separate records. Such report is published in 74 M.C.C. 324, and a copy thereof is

attached as Appendix "C" to the jurisdictional statement filed herein by the Commission. It should be noted that we are here concerned with only the Sub 102 application referred to in such report. The effect of the Division 1 report was to deny to J-T authority to perform the involved transportation *as a contract carrier* solely because one *common carrier held authority* to perform the transportation as such, which carrier had never performed any such transportation, but merely expressed a willingness so to do as a *common carrier*.

Petitions for reconsideration were filed by J-T, the Contract Carrier Conference of American Trucking Associations, Inc., and the Aircraft Industries Association of America, Inc., the latter having intervened in support of the application, to which petitions the motor common carrier responded, and on July 25, 1958, the Commission overruled all petitions for reconsideration.

Thereby J-T having exhausted its administrative remedies, on August 18, 1958 it filed an action in the United States District Court for the Western District of Missouri against the Interstate Commerce Commission and United States of America, being Civil Action No. 12010, challenging validity of the orders of the Commission upon the grounds that same were unreasonable, arbitrary, capricious, unlawful, in abuse of discretion, in excess of statutory authority and short of statutory right for the various reasons assigned in the complaint. Injunctive relief was prayed, and it was prayed that judgment and decree be entered setting aside said orders of the Commission, declaring same unlawful and void, and ordering and directing the Commission to issue to plaintiff a permit author-

izing it, as a contract carrier, to perform the transportation for which a need had been shown.

Subsequently, and before the filing of answer on behalf of either the United States of America or the Commission, Division 1 of the Commission handed down a report in another proceeding (*Application of William Edward Leary,* No. MC-39966, Sub No. 5, published 74 M.C.C. 361), which, upon the face thereof, appeared to be diametrically opposed in material respects to the order of the Commission in the case at bar of date January 31, 1958, published in 74 M.C.C. 324. J-T was advised, informally, that the Commission would accept another petition for reconsideration should same be tendered, whereupon J-T did tender to the Commission another petition for reconsideration which the Commission, by order of date October 16, 1958, accepted for filing, vacating its previous order of July 25, 1958, and reopening the proceeding for reconsideration on the then present record and issuance of further report and order. Having every reason to believe that by virtue of its conclusion to reconsider the Commission contemplated granting to J-T the permit to which it was entitled, by agreement of the parties and order was entered in cause No. 12010 in the United States District Court for the Western District of Missouri permitting plaintiff to take a voluntary non-suit without prejudice. Subsequent developments, however, indicate that J-T was led down the "primrose path". The Commission held the matter under advisement from October 16, 1958 to June 15, 1959, during which time it expanded and extended its decision of January 31, 1958, which initially had consisted of seven printed pages, disposing of two applications, as reflected by Appendix "C" to

the jurisdictional statement of the Commission filed herein, to a document of 28 printed pages, attached as Appendix "D" to the jurisdictional statement filed herein by the Interstate Commerce Commission. It is published in 79 M.C.C. at p. 695 et seq.

It was the impression of J-T in the court below, and the charge was made with obvious record foundation, that the report of the Commission of date June 15, 1959, *supra,* was nothing more nor less than an extended brief and argument in support of and in an effort to cure apparent defects in the report of January 31, 1958, 74 M.C.C. 324. It is significant that in neither of the jurisdictional statements filed by the respective appellants is any reference made to cause No. 12010 filed in the United States District Court for the Western District of Missouri, nor the circumstances under which dismissal thereof by J-T, without prejudice, was obtained.

With the handing down of the Commission's order of June 15, 1959, 79 M.C.C. 695, J-T Transport Company, Inc., having again exhausted its administrative remedies, filed the action here involved in the United States District Court for the Western District of Missouri, Western Division and, in due course, same was heard before a three-judge court consisting of Circuit Judges Johnson and Matthes, and District Judge Smith. The opinion of the court below is published in 185 F. Supp. 838 et seq., and is attached as Appendix "A" to the jurisdictional statement filed herein by the Interstate Commerce Commission.

It should be noted that in the proceeding before the United States District Court the Contract Carrier Conference of American Trucking Associations and

Aerospace Industries Association intervened in support of J-T and that U.S.A.C. Transport, Inc. and the Regular and Irregular Common Carrier Conferences of American Trucking Associations, Inc. intervened in opposition.

The United States of America answered, filed a brief and presented oral argument in the court below, but, as appears from the "Memorandum for the United States" filed in this court the United States has decided ". . . on further analysis of the facts and issues, not to appeal from the district court's adverse judgment."

In this connection it should be noted that in another cause, subsequently heard, in the United States District Court for the Western District of Arkansas, being Civil Action File No. 1531, styled *Elvin L. Reddish* v. *United States of America, Interstate Commerce Commission et al.*, wherein substantially identical legal principles were involved, the United States filed an answer essentially admitting all material allegations of the complaint, and by brief and argument supported the position of plaintiff in that cause. The opinion of the three-judge court, consisting of Circuit Judge Matthes and District Judges Miller and Young has not been published as of this date, but copy of the opinion of such court is attached as Appendix "B".

It is further of significance that the Interstate Commerce Commission, in the light of the unanimous and consistent opinions of the lower courts, has now itself apparently become convinced that in passing on applications for contract carrier permits it cannot impose its "sixth test", and that it must consider such appli-

cations solely in the light of the five tests afforded to it by Congress in the 1957 amendments to sec. 209(b) of the Act. In this connection, the most recent decision of the Commission to come to our attention is that in No. MC-117568, *TAM Fertilizer Carriers, Inc.—Contract Carrier Application,* in which the Commission's order on reconsideration was dated December 7, 1960, served December 19, 1960. The report of the Commission on reconsideration has not yet been published, and for the convenience of the court we attach copy thereof hereto as Appendix "C". There the applicant proposed to perform a contract carrier service by motor vehicle, serving three shippers, in the transportation of fertilizer, fertilizer materials and compounds; the application was opposed by a number of motor common carriers who had authority to perform the involved transportation, as well as by a number of rail carriers. It is interesting to note that the Commission, at sheet 7 of its report, contra to the position which it assumes in its jurisdictional statement in the case at bar, states:

> The evidence discloses that applicant, while it will dedicate its equipment to the exclusive use of the three supporting shippers rather than to that of each shipper, will provide a service meeting the distinct needs of these shippers. Thus, it appears that applicant's proposed operations are those of a contract carrier as defined in sec. 203(a)(15) of the Interstate Commerce Act, as amended. However, an applicant for authority as a contract carrier is entitled to a grant of authority only upon our finding that its proposed operations will be consistent with the public interest and the National Transportation Policy. In making such a determination, we are required to give consideration to, among other things, the following

> factors enumerated in sec. 209(b) of the Act, as amended: (1) the number of shippers to be served by applicant, (2) the nature of the service proposed, (3) the effect of the grant of authority on the services of protesting carriers, (4) the effect of a denial on applicant and its shippers, and (5) the changing character of the shipper's requirements."

It is respectfully presented that the Commission has *now recognized,* subsequent to the filing of its notice of appeal and jurisdictional statement herein, that it is bound, in passing upon applications for contract carrier permits, by the precise and specific criteria enunciated by the court below in its opinion in 185 F. Supp. 838, as well as sections 203(a)(15) and 209(b) of the Act as amended and that perforce it is manifest that the questions on which decision of the cause depends are so unsubstantial as not to need further argument. It is, therefore, submitted that the motion of J-T Transport Company, Inc. to dismiss or affirm should be sustained.

Our statements *supra* are not to be construed as intimating that we do not consider the questions here involved to be of importance. They are of the utmost importance. The future of the contract motor carrier industry, as well as the rights of thousands of shippers who now have available to them highly specialized contract carrier services, with dedication of equipment to their exclusive uses, and which services are tailored to meet the distinct needs of the shippers, are dependent upon the outcome of this litigation. Our position is that these important questions were settled by the Congress in its enactment of the amendments of 1957 to secs. 203(a)(15) and 209(b) of the Act, 49 U.S.C. 303(a)(15) and 309(b), and that they have been properly judicially laid to rest by the opinion of the court below reported in 185 F. Supp. 838 *et seq.* The questions simply need no further argument.

The litigation at bar is nothing more nor less than the apogee of the efforts of the Commission, since enactment of Part II of the Interstate Commerce Act in 1935, to regulate and restrict motor contract carriage for the benefit of motor common carriage. The enactment of Part II of the Act was dated August 9, 1935, 49 Stat. 543, 49 U.S.C. secs. 301 *et seq.*

As is reflected by the opinion below, and by reference to the decisions of the Commission referred to therein, while the Congress had provided in Part II of the Act for the issuance of permits to applicants for authority to engage in contract motor carrier operations, and for certificates to applicants for authority to engage in motor common carrier operations, the Commission embarked upon a course of strangulation of applications for contract motor carrier permits to the extent that the Congress, in 1940, was constrained

to and did enact what it termed a *National Transportation Policy.* This policy was enunciated for the purpose among others, as stated therein, ". . . to provide for fair and impartial regulation of all modes of transportation . . .". It was designed to have the Act ". . . so administered as to recognize and preserve the inherent advantages of each . . ." mode of transportation. This National Transportation Policy, being reported as a note preceding all pertinent parts of the Act, particularly preceding 49 U.S.C. 301, as we are here concerned, was enacted on September 18, 1940, as 54 Stat. 899.

The enactment by Congress of a National Transportation Policy did not accomplish the desired ends. The Commission still sought to impede the development of the contract motor carriage industry by the imposition of various and sundry tests of its own improvisation, resulting ultimately in the decision of this court in *United States* v. *Contract Steel Carriers,* 350 U.S. 409.

The premise with which we are here concerned, however, has been the persistent but unsuccessful effort of the Commission to obtain authority from the Congress under which it could deny applications for contract motor carrier permits solely upon the ground that the applicant had not established ". . . that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown."

The foregoing quotation is taken from page 131 of the 69th Annual Report of the Commission to Congress (1955), under the head "Legislative Recommendations."

Following the decision of this court in *United States* v. *Contract Steel Carriers,* 350 U.S. 409, in 1956, the

Commission, in its 70th Annual Report to Congress, under the head "Legislative Recommendations," at page 162, recommended that sec. 209(b) of the Act be amended: ". . . (2) *to provide that additional permits may be issued only upon a showing that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown.*" (Emphasis added)

It is interesting to note that in its Reports to Congress in 1955 and 1956 the Commission *acknowledged its lack of statutory authority* to deny contract carrier permits upon the basis that common carriers expressed a willingness to perform the involved transportation as common carriers and that, as hereinafter set forth, the Commission deemed it necessary to obtain Congressional approval for the results and effects of the decisions it had consistently handed down, denying contract carrier applications. The legislation to which we now allude was introduced in the Congress following the foregoing recommendation of the Commission in its 70th Annual Report. We propose to demonstrate, however, that even though the Commission was repulsed by Congress in its effort to impose upon contract carriers what the court below described as the "sixth test", that it did impose just such a test in denying the application of J-T Transport Company, Inc., herein, and solely upon such ground denied the application.

The legislative history of the amendments of 1957 to pertinent sections of the Act is of significance.

In the 1st Session of the 85th Congress the Commission procured the introduction of identical bills in the House and Senate, being H. R. 5123 and S. 1384. The Senate Bill, as amended, subsequently was en-

acted. The House Bill was superseded by H. R. 8825, which was identical with S. 1384 as amended. We shall, therefore, refer only to S. 1384, inasmuch as the hearings were conducted in connection therewith before a Subcommittee of the Committee on Interstate and Foreign Commerce of the United States Senate. The distinction between S. 1384, *as introduced and sponsored by the Commission,* and S. 1384, *as enacted into law by the Congress* is of paramount significance.

For convenience we here reproduce S. 1384 as introduced under the sponsorship of the Commission with emphasis added to pertinent portions thereof.

[S. 1384, 85th Cong., 1st sess.]

"A Bill To revise the definition of contract carrier by motor vehicle as set forth in section 203 (a) (15) of the Interstate Commerce Act, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That part II of the Interstate Commerce Act, as amended, is amended as follows:

(1) By changing paragraph (15) of section 203 (a) thereof (49 U. S. C., sec. 303 (a) (15)), to read as follows:

"(15) The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individ-

ual nature required by the customer *and not provided by common carriers.";*

"(2) By adding to section 203 (49 U. S. C. 303) the following new subsection:

"(c) Except as provided in section 202 (c), section 203 (b) in the exception in section 203 (a) (14), and in the second proviso in section 206 (a) (1), no person shall engage in any transportation for compensation by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation."; and

"(3) By adding to section 212 (49 U. S. C. 312) the following new subsection:

"(c) The Commission may upon its own initiative, upon application of a permit holder or upon complaint of an interested party, after notice and hearing, revoke a permit and issue in lieu thereof a certificate, if it finds that any person holding a permit whose operations on the date of enactment of this paragraph do not conform with the definition of a contract carrier in section 203 (a) (15), as revised , 1957; are those of a common carrier; and are otherwise lawful. The certificate of public convenience and necessity so issued shall authorize the transportation, as a common carrier, of the same commodities between the same points as authorized in the permit."

"Sec. 2. Part II of such Act is further amended by inserting between the words "thereunder," and "that" in the second sentence of section 209 (b) (49 U. S. C. 309 (b)), the following: *"that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown,"* and (2) by changing the third sentence thereof to read as follows: "The Com-

mission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier including terms, conditions, and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirement established by the Commission under section 204 (a) (2) and (6): Provided, That within the scope of the permit and any terms, conditions, or limitations, attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require." (Emphasis added.)

And now, for convenience, we reproduce S. 1384 *as enacted,* and which became effective on August 22, 1957. Therefrom it will be noted that the features of the bill as introduced, upon which we have placed emphasis, have been deleted and, we respectfully present, the Commission was forced to agree to delete same and concede that it could not obtain legislative sanction for the authority which it exercises by administrative edict in the case at bar by the very certain threat of being unable to obtain passage of any legislation with these features remaining therein.

"Public Law 85-163.

"85th Congress, S. 1384.

"August 22, 1957.

"AN ACT.

71 Stat. 411.

"To revise the definition of contract carrier by motor vehicle as set forth in section 203 (a) (15) of the Interstate Commerce Act, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That part II of the Interstate Commerce Act, as amended, is amended as follows:

"(1) By changing paragraph (15) of section 203 (a) thereof (49 U.S.C. 303 (a) (15)), to read as follows:

"(15) The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), *under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b)* for the furnishing of transportation services designed to meet the distinct need of each individual customer."

"(2) By adding to section 203 (49 U.S.C. 303), the following new subsection:

"(c) Except as provided in section 202 (c), section 203 (b), in the exception in section 203 (a) (14), and in the second proviso in section 206 (a) (1), no person shall engage in any for-hire transportation business by motor vehicle, in interstate

or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation,"; and

"(3) By adding to section 212 (49 U.S.C. 312), the following new subsection:

"(c) The Commission shall examine each outstanding permit and may within one hundred and eighty days after the date this subsection takes effect institute a proceeding either upon its own initiative, or upon application of a permit holder actually in operation or upon complaint of an interested party, and after notice and hearing revoke a permit and issue in lieu thereof a certificate of public convenience and necessity, if it finds, first, that any person holding a permit whose operations on the date this subsection takes effect do not conform with the definition of a contract carrier in section 203 (a) (15) as in force on and after the date this subsection takes effect; second, are those of a common carrier; and, third, are otherwise lawful. Such certificate so issued shall authorize the transportation, as a common carrier, of some of the same commodities between the same points or within the same territory as authorized in the permit."

"Sec. 2. Part II of such Act is further amended (1) by inserting after the second sentence of section 209 (b) (49 U.S.C. 309 (b)) a new sentence to read as follows: '*In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the*

changing character of that shipper's requirements.'; and (2) by changing the third sentence of section 209 (b) (49 U.S.C. 309 (b)) to read as follows: 'The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 204 (a) (2) and (6): Provided, That within the scope of the permit and any terms, conditions or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require: Provided further, That no terms, conditions or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203 (a) (15), as in force on and after the effective date of this proviso.

"Approved August 22, 1957." (Emphasis added)

The report of the Commission of June 15, 1959, Appendix D to the jurisdictional statement filed herein by the Commission, issued after the original suit had

been filed by J-T, would lead the court to believe that the Commission of its own volition deleted the objectionable features of S. 1384 as introduced. Such position does violence to the record.

Hearings on S. 1384 were conducted before a Subcommittee of the Committee on Interstate and Foreign Commerce of the United States Senate, 1st Session, 85th Congress, on April 17, May 7, 8 and 9, 1957, Senator George A. Smathers being chairman of the Subcommittee. Hereinafter we will refer to the printed transcript of the hearings as Hearings, with appropriate page reference.[1] In the course of the hearings tremendous opposition developed to S. 1384, primarily by virtue of the portions thereof which were eventually deleted, and the bill, as enacted, was the result of a compromise between representatives of the contract carrier industry and the common carrier industry with the understanding that the contract carrier industry had no opposition to the proposed legislation *so long as the existence of common carrier service might not be used by the Commission as the basis for denial of a contract carrier permit*, other prerequisites being met.

In limine, at pages 10 and 11 of Hearings, appears a letter from Mr. William P. Rogers, then Deputy Attorney General, writing on behalf of the Department of Justice to Honorable Warren G. Magnuson, Chairman, Committee on Interstate and Foreign Commerce, with reference to S. 1384, as introduced, in which, insofar as here pertinent, the Department of Justice opposed the bill in part and said:

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[1] "Surface Transportation—Scope of Authority of ICC—Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate, Eighty-Fifth Congress, First Session." (No. 92433 U.S. Government Printing Office, Washington, 1957.)

"The bill would amend section 203 (a) (15) of the Act by changing the definition of 'contract carrier' to mean any person who engages in transportation by motor vehicle of passengers or property in interstate commerce for compensation (with the exception of common carriers by motor vehicle and those engaged in motor vehicle transportation for hire as an express company) 'under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer and *not provided by common carriers.*' (Emphasis added.)

"We are opposed to enactment of that part of the definition, which reads '*and not provided by common carriers.*' This quoted limitation is rather vague and it could lead to the contention by common carriers that they provide contract carrier services. Such an interpretation might unduly limit the number and availability of contract carriers. Many contract carriers are small business men who would not be able to compete on a common carrier basis.

"The bill would also amend section 209 (b) of the Act, which sets forth the procedure and criteria to be observed in granting contract carrier permits, by adding a new criterion to the effect that the Commission must find '*that existing common carriers' are unwilling or unable to provide the type of service for which a need has been shown.* (Emphasis added.)

"The Department considers this proposed amendment unduly restrictive of the ability of applicants (particularly small business men) to enter the contract carriage field, and is therefore opposed to its enactment.

"The Bureau of the Budget has advised that there is no objection to the submission of this report."

The testimony of Honorable Owen Clarke, Chairman, Interstate Commerce Commission, in support of S. 1384, appears at pages 21 *et seq.* of Hearings, and we are reasonably sure that when Chairman Clarke testified he knew the attitude of the Department of Justice as reflected by the letter, *supra,* and he knew, as well, that the Department of Commerce was unalterably opposed to both of the objectionable features of the bill. And, of course, he was well aware of the very considerable opposition from shippers needing and using contract motor carrier service and of the contract motor carrier industry at large.

With these facts at hand Chairman Clarke m[illegible]nanimously [sic] agreed (Hearings page 22) to del[illegible] from the proposed amendment to section 209 (b) (49 U.S.C.A. 309 (b)) "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown," but, *and here the joker,* he said nothing about deleting the proposed amendment to section 203 (a) (15) (49 U.S.C.A., section 303 (a) (15)) "*. . . and not provided by common carriers.*" Throughout the testimony of Chairman Clarke he sought enactment of the legislation with the above feature remaining therein, the practical effect of which would have been to give the Commission authority to do that which it has here done, without authority, by administrative edict, and say that a carrier could not perform a service as a contract carrier if a common carrier offered to provide such a service.

The Congress refused to grant the Commission the authority it sought; deleted "and not provided by common carriers," and thereby definitely established that the existence of common carrier service *was not to preclude issuance of contract carrier permits, other*

prerequisites being met. That, however, is exactly what the Commission has here done.

We shall now endeavor to demonstrate from the legislative history of S. 1384 that deletion of these objectionable features was not due to magnanimity on the part of the Commission, and that S. 1384 became law *only by virtue of the fact that the Congress did not propose to authorize the Commission to deny an application for a contract carrier permit upon the basis of a common carrier averring its willingness to perform the needed transportation,* all other prerequisites being met.

We will not burden the Court with extensive quotations from the evidence adduced at the Hearings, but do say, without fear of successful contradiction, that S. 1384 with "and not provided by common carriers" remaining therein received the enthusiastic support of the Commission, of *common carriers* and the various Associations representing them. The Senators, however, were dubious of this joker, and the Department of Commerce, joining forces with the Department of Justice, as well as shippers, contract motor carriers, and Associations representing contract motor carriers vigorously opposed same upon the ground that the Commission would interpret it as authority to deny a contract carrier permit upon the ground that a common carrier averred a willingness to perform the same service.

Hon. Louis S. Rothschild, Undersecretary for Transportation, Department of Commerce, testified before the Subcommittee on May 8, 1957; his testimony appears at pages 197 et seq., of the Hearings. The Senators, in the course of his testimony, evinced an early interest as to his views with respect to the

"joker". Before Mr. Rothschild could get to the point Senator Schoeppel, at page 200, said:

> I would like to ask a question right there: Supposing you had a common carrier serving certain territory but wasn't furnishing adequate service. There was common carrier service there, but of a very limited nature, and with the mode and extent of doing business nowadays would you draw the line there that the common carrier had to furnish reasonable adequate and prompt service?

To the foregoing question Mr. Rothschild, at page 201, responded:

> Well, later in my statement, Senator Schoeppel, we say that we don't quite believe that the rule should be as stringent as proposed by the ICC and that it should not be necessary to make all of these showings in order for a person to get a contract carrier.

On the same page, speaking with reference to the contract carrier industry, Mr. Rothschild said:

> Contract carriers by motor vehicle developed prior to enactment of the Motor Carrier Act in response to the needs of certain shippers who could not or preferred not to provide their own transportation, yet required a more specialized and individual service than was available from common carrier.
>
> A contract carrier would enter into a special agreement with a single shipper, usually on a long-term or individual basis, under which the carrier would provide a service which was closely integrated to the particular needs of the shipper. It was the kind of service which the shipper himself might have provided had he so elected, and it constituted in essence a virtual dedication of the carrier to the needs of a single shipper, or in some cases, a group of closely related shippers.

> The Congress, in enacting legislation to regulate the motor transportation industry, recognized this development and provided for a different degree of regulation applicable to contract carriers than it provided for common carriers.

Senator Smathers, Chairman of the Subcommittee, and Mr. Rothschild, clearly express the Congressional intent in deleting the joker *"and not provided by common carriers"*, at pages 202 and 203 of the Hearings.

Mr. Rothschild, among other things not here pertinent made this statement at page 202:

> Commissioner Clarke, in testifying on S. 1384 yesterday withdrew the Commission's request for authority to deny application for contract authority unless it is shown that existing common carriers are unwilling or unable to provide the required type of service.

He was interrupted by an immaterial question, and then Mr. Rothschild continued in response to a question from Senator Smathers, as follows:

> "We would not object to that change. However, *the Department does not believe that the existence or non-existence of adequate common carrier service should be included in the definition of a contract carrier by motor vehicle as one of the distinguishing characteristics of a contract carrier.* Perhaps I should explain that a little more, Mr. Chairman." (Emphasis added.)
>
> Senator Smathers: We would appreciate it.
>
> Mr. Rothschild: As we read the proposal of the Interstate Commerce Commission, and then the amended position which they took in Commissioner Clarke's statement yesterday, *we believe that what they are currently proposing is that in the definition of a contract carrier by motor vehicle,*

the existence or non-existence of common carrier motor service should be included, but when it comes to their own procedures as to how they operate under this, they retain for themselves the right to cast that qualification out. *We think, in order to be consistent, it ought to be out both places.* (Emphasis added.)

Senator Smathers: In other words, as the Senator from Kansas brought out, whether or not there is the availability of a common service should not be a point in consideration?

Mr. Rothschild: *They should not be able to deny the application of a common* [sic] (*contract*) *carrier simply because someone claims that there is common carrier service there.* (Emphasis added.)

Senator Smathers: Thank you.

Mr. Rothschild: Does that answer your question, Senator Schoeppel?

Senator Schoeppel: Yes.

The Department of Commerce had introduced a bill of its own designed to redefine "contract carrier", and in connection therewith a comparison was being made by the Senators with the ICC sponsored bill. At page 204 of the Hearings, and during the course of Mr. Rothschild's testimony, Senator Smathers said:

So then you people made a proposal and the ICC has made a proposal. Now let's look at the ICC proposal for just a minute to see how they propose to redefine what we mean by contract carriers. I am going to read. (Senator Smathers then reads the proposed definition of contract carrier contained in the proposed amendment to S. 1384, including "and not provided by common carrier". And then the Senator goes on): Now as I gather it, your particular recommendation is

that there be no limit as to the number of persons with whom they do business?

And then the following colloquy took place:

Mr. Rothschild: No, sir; we think the Commission should have the right to take into consideration the number of contracts that a contract carrier would have, but we do not believe that this definition which is contained in line 4, 5 and 6 should apply at that point any more than the Commission says it should not apply in Section 2 of the same proposal.

Senator Smathers: In other words, then, you would be satisfied with the language on line 3, page 2, "under continuing contracts with one person or a limited number of persons"?

Mr. Rothschild: For the furnishing of transportation services.

Senator Smathers: For the furnishing of transportation services of a special, etc. But I want to get just this language here that you are satisfied with.

Mr. Rothschild: We would stop that definition with the word "customer" in line 6.

Line 6 in the format of the Bill was simply "customers not provided by common carriers", and as Mr. Rothschild told Senator Smathers, the Department of Commerce would put a period after "customers" and delete "not provided by common carriers".

And then further, in discussing the proposal of Chairman Clarke to delete "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown" and leaving in "and not provided by common carriers", the following discussion took place between Senator Smath-

ers and Mr. Rothschild at pages 206 and 207 of Hearings:

Senator Smathers: . . . Now, we come on down to the next line: "for the furnishing of transportation services of a special and individual nature required by the customer". You want to start right there and "not provided by common carrier"?

Mr. Rothschild: We still prefer our own definition, but this would be the same.

Senator Smathers: Except you leave out "and not provided by common carriage".

Mr. Rothschild: Yes.

Senator Smathers: We, as a committee, don't like to be caught between departments of the government, so to speak, the ICC with one bill, and the Department of Commerce with another bill, each one fighting for its own language because we have to resolve it a little bit. This language to be satisfactory to you I gat! we left off that last phrase on line 6 "and not provided by common carrier" is that correct?

Mr. Rothschild: Yes, sir.

Senator Smathers: Did I get an answer to that?

Mr. Rothschild: The answer is yes.

Senator Smathers: I understand yesterday Chairman Clarke withdrew the Commission's support for this last phrase; is that correct?

Mr. Rothschild: In section 2, not in section 1.

Senator Smathers: Not in section 1, but in section 2. You will find it on page 10 of your statement. What did he have reference to in this bill where he said he wanted to withdraw it?

Mr. Rothschild: May I read a paragraph from your statement of yesterday?

Senator Smathers: Yes, so we can clear on it.

Mr. Rothschild: Commissioner Clarke said that: 'as drafted, S. 1384 would further provide that additional permits may be issued only upon a showing that existing common carriers are unwilling or unable to render the required type of service. I wish to state at this point that because of the very difficult burden of proof that would be imposed on applicants by the last-mentioned provision, the Commission upon further consideration voted to withdraw its recommendation to amend section 209. We therefore recommend that lines 9 through 15 on page 3 be amended to read:

(Mr. Rothschild continues): So that would eliminate the words that existing common carriers are unwilling or unable to provide the service for which a need has been shown.

Senator Smathers: He would eliminate that on lines 12, 13, and 14. Is that correct?

Mr. Rothschild: That is correct.

Senator Smathers: Is it your understanding, Mr. Barton—how does he feel about it on line 6, do you know?

Mr. Barton: (Commission counsel): I understand he wanted to withdraw that requirement altogether.

Mr. Rothschild: *Our interpretation may not be correct, but we think he wanted it in the definition but not in section 2. We think it should come out in both places.* (Emphasis supplied.)

As a definite indication that the Senators were interpreting the proposal to delete "and not provided by common carriers" as assurance that the Commission would not have authority to deny a contract carrier permit because common carrier service was alleged to

be available, we refer the Court to Hearings, page 214, where the testimony of Mr. H. O. Matthews, General Manager of the Transportation and Distribution Division of Armour & Company appears:

> Mr. Matthews: As I understand it, Senator, it would permit the common carriers to complain that they are in a position to render that same service, and therefore the Commission would take the contract carrier out of business, or quit.
>
> Senator Smathers: Well, we have all agreed—you just heard the Department of Commerce here, and you heard probably the Secretary of the ICC yesterday——
>
> Mr. Matthews: I didn't hear him.
>
> Senator Smathers: *Apparently they are in agreement that they should strike out the words "and not provided by common carriers".* (Emphasis supplied.)
>
> Mr. Matthews: This, of course, was prepared around that, and I didn't understand what the Secretary was saying.
>
> Senator Smathers: If we leave out the words "not provided by common carriage", even though there may be common carriage in the area, it does not prohibit you from still doing business with a contract carrier.
>
> Mr. Matthews: With the suggestion of changes in the wording you were making a while ago, Senator, that might change that, although I haven't had an opportunity to review it. I didn't have the bill in front of me, and this statement was based on the bill as it was worded, and I will not burden you with reading further on that because that might be ambiguous to the situation as it exists should the bill be changed.
>
> Senator Smathers: All right.

> Senator Schoeppel: Mr. Chairman, that just points out we have a perplexing problem here to incorporate language in the bill. Our friends from the ICC submitted a bill the way they wanted it. Now there have been some changes suggested. Now you come up with these points, and we have to wrestle with it. Now, some of these explanations here, by way of illustration, furnish us with an opportunity for discussing this matter in executive session and otherwise, to keep this thing on some kind of a, let us say, progressive yet equitably fair legislative basis.

With respect to the proposal of the Commission to delete "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown" in section 2 of proposed S. 1384 and leaving "and not provided by common carriers" in section 1 thereof, Mr. Matthews, at page 219 of the Hearings said:

> *Based upon Chairman Clarke's prepared statement my opposition to S. 1384 is intensified rather than eliminated. As I read his testimony, no change is suggested in section 1 of the proposed bill. The entire change to be in section 2. While the test to be applied to a new contract carrier is possibly modified to some extent by the amendment, it would still be extremely difficult to obtain new contract carriage within the definition of section 1 of the Act.*

To the same effect see the testimony of Hon. Clarence D. Todd, General Counsel for the Contract Carrier Conference of the American Trucking Associations, Inc., and the colloquy between Mr. Todd, Senators Schoeppel and Lausche, in which it was developed that leaving "and not provided by common carriers" in the proposed bill would enable the Com-

mission to withhold permits for contract carriers to the same extent as would have been the case had "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown" been permitted to remain therein. And, in this same connection, see the colloquy between Senator Lausche and Mr. Howard E. LeFevre, a contract carrier serving Ford Motor Company, in which it was developed that to delete "and not provided by a common carrier" would prevent the Commission from denying an application for a contract carrier permit or extension of a contract carriers' service on the ground that a common carrier was willing to provide the service.

In the testimony of Mr. E. G. Rice, President, Complete Auto Transit, Inc., a contract carrier serving General Motors, reference again is made to the proposal of the Commission to delete one portion of the objectionable feature of S. 1384 and leaving in the joker "and not provided by common carriers". At page 328 of Hearings, the following appears:

> Senator Lausche: You are not giving testimony on S. 1769?
>
> Mr. Rice: No. There is a provision in there that the service will not be provided by common carrier, and that Mr. Clarke did nothing about. However, further on there is the matter of the issuance of a permit and a common carrier being fit, willing and able. That he agreed to take out. However, *I make the point if it is in the first place you will never get to the second. You can't become a carrier under the definition, so it should come out in both places, and I think Mr. Todd so testified.*
>
> Senator Lausche: I think he testified that S. 1384 would further provide that additional per-

mits may be issued only upon showing that existing common carriers are unwilling or unable to render the required type of service. Now, your opposition to this proposal is that while he agrees to rectify the language in Section 1, part II, he doesn't do so in the definition?

Mr. Rice: That is right, and you will never reach Part II because you wouldn't be a carrier under the definition.

Senator Lausche. I see, all right. Thank you very much.

Mr. Rice: *So it should be out in both places.* Thank you. (Emphasis added.)

We have made the statement heretofore that S. 1384 as enacted, was compromise legislation worked out between the Commission and the representatives of the contract and common carrier industries, with the understanding and agreement that the Commission might be granted authority to limit contract carriers as to the number of contracts which they might hold and the services which they might perform, but that the Commission *would not have authority to deny an application for a contract carrier permit on the ground that a common carrier was willing to perform the proposed transportation service for which a need has been shown.* In support of our statement we respectfully refer the Court to the testimony of Mr. Thomas F. Robertson, Executive Director, Common Carrier Conference—Irregular Route—American Trucking Associations, Inc. Hearings, pp. 345 et seq. Mr. Robertson prefaces his testimony by the statement that the carriers he represents are those which are most competitive with the contract carriers, and then he says:

We have studied these bills and we have discussed them with our colleagues up in ATA and in

deference to our contract-carrier colleagues the membership of our conference would be most happy to yield on several points in the bill. We would yield to the removal of the word "specialized" in the definition which I think is in Part I, where they talk about special and individual nature, *and we would also yield to the deletion of the words "and not provided by common carriers," in addition to what the Commission has already yielded in Part II of the Act, where the Commission lately made up its mind that it would remove that "unwilling and unable" that burden of proof that a contract carrier would have.* (Emphasis supplied.

We would yield these things to gain the *main objectives*, sir, and the main objective, to our point of view, is that the Commission have the unequivocal power to limit the number of contracts, and that they also would have a reasonable grandfather clause that would protect the property rights of those contract carriers who would no longer be within the new definition. We think that only fair.

After hearing the testimony of Mr. Robertson on the compromise legislation which had been worked out the Senators took special precautions to see that the Interstate Commerce Commission was represented and had no objection to the compromise, as appears at page 348 of the hearings, as follows:

Senator Lausche: Is there a representative of the Interstate Commerce Commission here today?

Mr. Hardin: Yes, sir.

Senator Lausche: You are hearing what is being said?

Mr. Hardin: Yes, sir.

Senator Lausche: All right.

A reference to S. 1384, as enacted, *supra,* will disclose that Congress prescribed five, and only five, prerequisites for the issuance of a contract carrier permit. In the case at bar the Commission has added a *sixth test,* contained in S. 1384 as introduced, deleted by agreement and in the face of invulnerable opposition, under the heading "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown" and "and not provided by common carriers". In this connection we find the same view prevailing with at least some members of the Commission. Commissioner Webb, at pages 60a, et seq. of Appendix "D" to the jurisdictional statement filed by the Commission herein, has this to say:

> "Weighing the five tests prescribed by Section 209 (b) of the Act for determining whether a permit should be issued, I agree with the result reached by the majority. *It seems to me, however, that the report prescribes a sixth test not authorized by Congress and, in fact, a test considered by the Congress and deliberately rejected.* The report seems to me to convey the impression that if an applicant for contract carrier authority flunks this sixth test, the application must be denied regardless of the extent to which the five enumerated tests of Section 209 (b) have been satisfied. (Emphasis added.)
>
> "What I call the sixth test prescribed by the report is the conclusion that in each contract carrier application the burden is on the applicant to show that protesting common carriers are unwilling or unable to meet the shippers' reasonable transportation requirements. *The conclusion, in my opinion, is not supported by the language of public 85-163 or by the pertinent legislative history.* (Emphasis added.)

"When the bill S. 1384 which became public law 85-163 was introduced, it amended Section 203(a) (15) of the Act so as to define a contract carrier as one who conducts its business other than as a common carrier and—". . . under continuing contract with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer *and not provided by common carriers.*"

"The Senate Committee on Interstate and Foreign Commerce deleted the language emphasized above. In addition, the Committee eliminated from the bill the requirement of a showing under Section 209 (b) "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." In place of the language last quoted, the Committee directed the Commission to consider "the effect which granting the permit would have upon the services of the protesting carriers." As thus amended, the bill was enacted into law.

"Obviously there is virtually no difference between the test formulated in the report of the Commission and the test which would have been prescribed by the language deleted from the bill. I do not see how it is possible to contend that the stricken language added nothing to the bill. Nor do I agree that the Senate Committee deleted that language solely because it required an impossible burden of proof. If the Congress had intended to sanction the test employed in the report, it would no doubt have required in Section 203 (a) (15) that the proposed service must be shown to be "not provided by *protestant* common carriers" and in Section 209 (b) "that *protestant* common carriers are unwilling or unable to provide the type of service for which a need has been shown."

"Contract carriers opposed the bill as originally introduced on the ground that the required proof as to the non-existence of adequate common carrier service would prevent extension of, if not destroy, contract carrier service. The Department of Commerce agreed. The Congress agreed. The need to employ a public and convenience necessity standard in Section 209 proceedings disappear when, under the new law, permits cease to be unrestricted licenses for hunting traffic. *As I see it the report attempts to write into Section 203 (a) (15) and 209 (b) language deliberately stricken by the Congress. The report converts compromised legislation, generally satisfactory to all concerned, into an unearned legislative victory for common carriers and a humiliating defeat for contract carriers.*" (Emphasis in last paragraph supplied).

Commissioner Webb, prior to the preparation of his opinion, *supra,* had undoubtedly been in close contact with the progress of S. 1384 as it moved to final enactment by the Senate, as well as with H. R. 5123, as superseded by H. R. 8825, as it progressed through the House, and had been in attendance at the executive sessions of the Commission in which it was determined that in the face of substantial opposition to the efforts of the Commission to obtain legislative sanction for denial of contract carrier permits if common carrier service was available, it would abandon such approach and seek enactment only of those features of S. 1384 worked out in compromise.

Senate report No. 703 of the First Session, 85th Congress, was submitted by Senator Smathers of the Committee on interstate and foreign commerce to accompany S. 1384. In the introduction he states the purpose of the bill, and there is no indication in the

statement of purpose of any intent to grant the Commission additional authority to impose the sixth test referred to by Commissioner Webb.

Senator Smathers and the Committee emphasized recognition of the distinction between the two modes of transportation, i. e., contract and common motor carriage when, in speaking with reference to the proposed redefinition of contract carriage the report on page 2 says:

> "Congress recognized in the definition a difference between common and contract carriers, but, as Commission Chairman Clarke pointed out, the language of the present law is inadequate for proper administration and for observing the distinctions which Congress contended. Under the bill as introduced a contract carrier would be one who conducts its business other than as a common carrier and . . . under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer and *not provided by common carriers.* (Emphasis supplied.)
>
> "Chief among the differences thus proposed are that a contract carrier could have only one contract or a limited number of contracts. *Important also is that the service would be such as it not provided by common carriers. These changes would constitute a significant tightening of the present law.*" (Emphasis supplied.)

And, then, in further reporting on S. 1384 as introduced, the report at page 3 says:

> "A further change would be effected whereby that portion of Section 209 (b) (49 U. S. C. 309 (b)) relating to the issuance of a contract carrier permit would include a provision that a permit

would be issued when it appears, inter alia, 'that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown.' Presumably this was intended by the drafters to supplement the language in the definition providing that a contract carrier service is such as is 'not provided by common carriers.'"

And, then, as here pertinent, the report of the Committee on page 3 continues as follows:

"Undoubtedly the bill as introduced would supply a more positive statutory guide to the Commission than that existing today, and would make readily possible clearer distinctions than now exists as between motor common and contract carriers. *The Committee is of the opinion, however, that, as originally introduced, S. 1384 would be unduly restrictive on contract carriage. Accordingly, the Committee recommends a number of amendments to the bill.*" (Emphasis supplied.)

The Committee then, after observing that S. 1384 as introduced was the first specific attempt by the Commission to procure enactment of legislation on the subject matter thereof, reported thus on page 4:

"However, the Commission, upon reflection, on the objections of contract and private carriers to the bill, concluded that in some respects S. 1384 *would provide too rigid a pattern.* It decided that the proposed requirement in Section 209 (b) that additional permits could be issued only upon a showing that existing common carriers are unwilling or unable to render the required type of service should be withdrawn. And it asked for opportunity to make additional comments should the testimony of other parties propose further amendments. As will appear later, further amendments

were proposed, and the Commission has given the Committee its views respecting them."

The Committee, in its report, then details the support to S. 1384 by witnesses representing the common carriers, their associations, and the railroads, as well as the opposition to S. 1384 from substantial shippers, contract carriers, and associations representing contract carriers. The Committee then said at page 5 of its report:

> "The Department of Commerce, speaking through the Under Secretary for transportation, noted critically that some contract carriers today furnish a common carrier service and argued that a limitation on the number of contracts that may be heard is desirable, as proposed in the bill. *It does not believe that the existence or non-existence of adequate common carrier service should be included in the definition of contract carrier.*" (Emphasis supplied.)

In further discussing the amendments recommended by the Committee which would strike from Section 1 of S. 1384 as introduced the language "and not provided by common carriers," and which would strike from Section 2 thereof the language "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown," the Committee said at pages 5 and 6 of its report:

> "Insofar as language is concerned, there can be no doubt that some of the parties at first entertained rather sharply divergent views as to the wording Congress might wisely and fairly adopt to express its own considered judgment. That all parties or groups affected by the bill are earnestly concerned with the problems giving rise to its

introduction is evidenced by the variety and range of interests appearing and testifying, and by the thoughtfulness of their presentation.

An apparent desire to obtain constructive legislation has motivated the most active parties and groups to confer, since the hearings, to arrive at language acceptable to them, and to communicate to the Sub-Committee through their spokesmen their views and their proposed language. The language thus arrived at has been submittted also to the Interstate Commerce Commission, and we have been officially notified of the Commission's approval thereof. It appears to your Committee that the major defects in the present Statute would be corrected by the new language, and the major objectives of S. 1384, as introduced, would achieve *without unduly restricting contract carriage.*" (Emphasis supplied.)

The report is speaking, of course, of S. 1384 as proposed to be amended by the Committee, deleting the objectionable features of Sections 1 and 2 thereof pointed out, *supra*. The proposed amendments to S. 1384 are then set out in the report. They delete from S. 1384 as introduced the features to which the contract carriers and their representatives had objected, i. e., "and not provided by common carriers" contained in proposed Section No. 1, and "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown" in proposed Section No. 2, whereby the Commission would have been granted authority to deny applications for contract carrier permits upon those bases.

The House of Representatives issued its report No. 970 to accompany H. R. 8825, this bill being identical to S. 1384 as enacted. The report, in stating the purpose of the proposed legislation, makes no mention

of any intention to permit the Commission to deny a contract carrier application upon the ground that common carrier service is allegedly available. In support of our statement heretofore made that the legislation enacted was compromise legislation, the compromise, insofar as here pertinent, being in striking from the bills "and not provided by common carriers" and "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown," we refer to page two of House Report No. 970 as follows:

> "Hearings were held on H. R. 8825 by the Transportation and Communications Subcommittee of this committee on July 23, 1957. A predecessor bill, H. R. 5123, was introduced *at the request of the Interstate Commerce Commission* to implement its legislative recommendation No. 6 contained in its Seventieth Annual Report to the Congress. *The latter bill was not satisfactory to various groups affected by this legislation. Further conferences were held among these groups and a compromise bill was prepared as a substitute for H. R. 5123.* A substitute bill, H. R. 8825, has the support of the Interstate Commerce Commission, Association of American Railroads, all segments of the trucking industry represented by American Trucking Associations, Inc., including the Regular Common Carrier Conference and the Contract Carrier Conference, and the Transportation Association of America." (Emphasis added.)

It is clear that by enactment of S. 1384 the Congress intended it as a mandate to the Commission to effectuate the National Transportation Policy and so to administer the Act as to recognize and preserve the inherent advantages of both contract and common motor carrier service. In this connection the Com-

mittee on Interstate and Foreign Commerce of the Senate, in the concluding statement of its report, said:

> "Common and contract carriage are unlike; the degrees of regulations applicable to them are unequal; their functions in our national transportation system are unlike. These inherent differences are such as require statutory language clearly capable of being administered and interpreted so as to properly reflect these differences."

Senate Report No. 703 is published in *U. S. Code Congressional and Administrative News,* 85th Congress, 1st Session, at page 1599.

Further, in this same connection, Senator Smathers inserted in the Congressional Record of August 8, 1957, at page 12770 a statement in explanation of the bill, where he stated that the differences between contract and common carriers by motor vehicle are important and meaningful at law and in practical effect, and:

> "What the Committee has attempted to do, among other things, is to preserve genuine contract carriage for its proper role in our transportation economy."

Senator Smathers then discussed the decision of the Supreme Court in the *Contract Steel Case, supra,* and concludes his remark as follows:

> "The decision of the Supreme Court clearly means that the Congress should do something to correct the situation. *The Commission came to us with a bill designed to solve the problem. The language of that bill was unacceptable to certain of the parties, especially the contract carriers.* Those contract carriers, however, support the bill as now drafted. . . . The new bill, *while not as drastic as the Interstate Commerce Commission's*

proposals, achieves many of the purposes sought to be achieved by the Commission in its bill. In view of all this, the committee recommends that the bill be approved."

SUMMARY AND CONCLUSION

In the orders of the Commission attacked in the court below J-T Transport Co., Inc. was found to be a contract motor carrier within the meaning of the Act. Under its application for a permit it proposed, under a continuing contract with one shipper to furnish transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of this shipper and to furnish a transportation service designed to meet the distinct need of this customer, as provided in sec. 203(a)(15) of the Act, 49 U.S.C. 303(a)(15).

Sec. 209(b) of the Act, as amended, 49 U.S.C. 309 (b) is mandatory and, in pertinent part, is as follows:

> "Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to sec. 210, a permit *shall* be issued to any qualified applicant therefor authorizing in full or in part their operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the National

Transportation Policy declared in this Act; otherwise, such application shall be denied. *In determining whether issuance of a permit will be consistent with the public interest and the National Transportation Policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements.*" (Emphasis added)

There is no averment in the jurisdictional statement filed on behalf of any appellant that J-T Transport Co., Inc. is not fit, willing or able to meet the requirements of the Commission for issuance of a permit as a contract motor carrier.

We would not presume to say that the Commission should not, in applying the *five* tests set forth in sec. 209(b) of the Act, as amended, also take into consideration the question of consistency with the public interest and the National Transportation Policy as enunciated by Congress, but we do say, with all the emphasis at our command, that where the Commission has gone to the Congress and said, and we paraphrase:

> "Give us authority to deny applications for contract motor carrier permits solely upon the ground that a motor common carrier avers its willingness and ability, as a common carrier, to perform the involved transportation, and to that end add to sec. 203(a)(15) the proviso 'and not provided by common carriers', and incorporate in sec. 209(b) of the Act the phrase 'that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown.'"

and that to this request of the Commission the Congress answered an emphatic *NO*, such refusal merits great consideration.

The foregoing is precisely the request made by the Commission of the Congress in 1957. The request of the Commission was opposed by the Department of Justice and by the Department of Commerce, as well as by numerous segments of the affected economy, shippers, motor carriers, and their associations, alike.

By its administrative edict in the orders herein attacked the Commission would add to the criteria for granting a permit to an applicant to perform contract motor carrier service the "sixth test", as above, and it is solely and alone upon the imposition and application of such "sixth test" that the Commission has denied the application involved in this proceeding.

We see no need to burden the court with citation of precedent to its long-established rule that the legislative history of enactments of Congress is to be accorded significance in construing the intent of Congress, and neither do we deem it indicated that we cite authority for the proposition that where the Commission goes before Congress and asks for authority to apply *six tests*, and receives authority to apply *five tests*, that the age-old maxim *inclusio unius exclusio alterius* comes into full play.

It is the position of J-T Transport Co., Inc. that the court below has fully considered and properly decided all factual and legal questions involved, and that the appeals herein present no substantial question for the decision of this court.

It is respectfully submitted, therefore, that the motion of J-T Transport Company, Inc. to dismiss or

affirm should be sustained, and that this court should not assume jurisdiction in the causes.

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January 16, 1961

APPENDIX "A"

INTERSTATE COMMERCE COMMISSION

Served

NOTICE TO THE PARTIES

Exceptions, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D. C., and served on all other parties in interest, within 30 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If the exceptions are filed, replies thereto may be filed within 20 days after the final date for filing exceptions.

Any new operation to be authorized by the recommended order herein if it becomes effective may not be commenced until such time as the certificate, permit, or license has actually been issued. The certificate, permit, or license will not be issued until the applicant has complied with the provisions of the Interstate Commerce Act and the requirements of the Commission thereunder. It should not be assumed that the recommended order has become effective as the order of the Commission until a notice to that effect, signed by the Secretary of the Commission, has been received.

No. MC-11185 (Sub-No. 102)

J-T TRANSPORT COMPANY, INC., EXTENSION—INDIANAPOLIS, IND.

Decided

1. Operation by applicant as a contract carrier by motor vehicle, over irregular routes, of aircraft assemblies, un-

crated, requiring special handling and equipment because of fragile nature, from Indianapolis, Ind., to Wichita, Kans., found consistent with the public interest and the national transportation policy.

2. Dual operations approved.

3. Issuance of a permit approved upon compliance by applicant with certain conditions, and application in all other respects denied.

James W. Wrape for applicant.

Douglas McHendrie, Paul F. Sullivan and *Ernest A. Brooks, II* for protestants.

REPORT AND ORDER

RECOMMENDED BY LEO W. CUNNINGHAM, EXAMINER

By application filed March 14, 1957, J-T Transport Company, Inc., of Kansas City, Mo., seeks a permit authorizing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes, of aircraft assemblies, uncrated, requiring special handling and equipment because of fragile nature, from Indianapolis, Ind., to Wichita, Kans.

The application was referred to the examiner for hearing and the recommendation of an appropriate order thereon. Hearing was held on May 22, 1957 at Denver, Colo. Rail carriers in the involved area and seven motor common carriers oppose the granting of the application.

Applicant, as pertinent herein, now holds authority to operate as a contract carrier by motor vehicle, over irregular routes, of uncrated airplane parts and equipment requiring special handling and equipment, (except airplane engines, (1) from Grand Prairie, Tex., to Burbank, Calif., (2) from Burbank and Manhattan Beach, Calif., (3) Brady and Grand Prairie, Tex., and Utica and Detroit, Mich., to Wichita, (4) between Garland and Grand Prairie, Tex., and

on the one hand, and, on the other, St. Louis, Mo., and (5) between Litchfield Park, Ariz., and Columbus, Ohio. It also holds temporary authority for 120 days beginning April 9, 1957 to operate as a contract carrier by motor vehicle, over irregular routes, of landing gear bulkheads, uncrated, requiring special equipment and special handling, from Indianapolis to Wichita. Applicant operates 33 tractors and 45 trailers. The trailer which it is using from Indianapolis to Wichita under its temporary authority and which it will use in the proposed operation if the authority sought is granted was specially constructed. It is 35 feet long, 12 feet 6 inches high and 8 feet wide. It has an underslung frame and an electric elevator is built in the trailer which operates with cables to raise and elevate the floor from the underslung part of the trailer up even to the rear wheels so that an airplane part can be rolled in or out. The roof also raises up and down with the elevator. Special floor racks move with the trailer for the loading and unloading of airplane parts. A terminal is maintained at Wichita.

Applicant's balance sheet as of April 30, 1957, shows current assets of $162,744, current liabilities of $78,333, and surplus of $240,801. Its net profit for the first 4 months of 1957 was $7,664. Applicant is fit and able, financially and otherwise, to perform the proposed operation.

Applicant has two affiliated motor carriers under common control, namely, Jack Cooper, Jr., and Thom Cooper, a partnership, doing business as J-T Transport Company, which has authority to operate as a common carrier, over irregular routes, of automobiles and trucks, in initial movements from Detroit and points in that area to certain points in Kansas and Missouri, and Jack Cooper Transport Company, Inc., which holds authority to operate as a contract carrier by motor vehicle, over irregular routes, (1) of automobile, trucks, and buses, in initial movements, from Kansas City to points in several States, and (2) automobiles, trucks and buses, in secondary movements, between points in 14 western States.

Boeing Airplane Company supports the application. As pertinent herein, it operates a plant at Wichita for the production of airplanes. It has been using applicant's service to transport landing gear bulkheads from Indianapolis to Wichita for about 4 months to the extent of about 4 loads a month. A load consists of 4 landing gear bulkheads, each weighing about 1380 pounds. The bulkheads are made of aluminum, titanium and magnesium and extreme care must be used for their transportation. Each one is worth about $24,000. Applicant's one piece of equipment as above-described was made for the exclusive use of this shipper for the operation involved herein and such equipment is necessary to adequately handle its transportation requirements from Indianapolis to Wichita. Applicant now serves this shipper and works closely with it on its transportation problems and since it has a terminal at Wichita its equipment can be furnished on short notice. The bulkheads must move in an expedited service as they must be at the plant when they have to be installed at a certain specified time. Prior to the use of applicant's service rail service was used but the cost of constructing special containers made this service prohibitive. Although in the past only landing gear bulkheads have moved other airplane parts may move in the future.

The record shows that there is interline rail service from Indianapolis to Wichita and that they are in a position to handle additional traffic.

Three motor common carriers submitted evidence in opposition to the application as pertinent herein. U.S.A.C. Transport, Inc., operates, over irregular routes, for the transportation of aircraft parts, crated or uncrated, restricted to parts requiring special equipment or handling by reason of size, weight, or fragile character, between points in the United States east of the Mississippi River, on the one hand, and, on the other, points west of the Mississippi River. It operates 115 tractors and 227 trailers and

maintains terminals at Indianapolis, Dallas, Tex., and Topeka, Kans., among other points. It has handled numerous shipments of airplane parts which because of size or weight have required special handling or equipment from and to points not involved herein. It claims that if its equipment is not suitable for the transportation requirements of the shipper herein it will construct any type of equipment that is needed.

Belger Cartage Service, Inc., operates over irregular routes, for the transportation of heavy machinery and such commodities as require the use of special equipment by reason of size or weight, between points in Missouri and Kansas. It has solicited the shipper for traffic but has never received any. Daniel Hamm Drayage Company operates, over irregular routes, for the transportation of commodities, the transportation of which, because of size or weight, require the use of special equipment, between points in Indiana and Missouri. By an interline arrangement at Kansas City these two motor carriers contend that they could handle the traffic herein. Hamm claims to have some equipment that could be used to satisfy the shipper's needs from Indianapolis to Wichita. All of the above-named three motor carriers are in a position to handle additional traffic.

Summarizing briefly, one shipper supports the application. As concerned herein, it now is using applicant's service under temporary authority from Indianapolis to Wichita. Applicant has constructed a special unit of equipment as hereinbefore described to handle the shipper's traffic as herein involved and such equipment is dedicated to the exclusive use of the supporting shipper. Applicant's terminal at Wichita is located near the shipper's plant and its special equipment can be obtained on one hour's notice. In the circumstances, the examiner is of the opinion that a need has been shown for the proposed operation and that a grant of such authority will not adversely affect present transportation facilities to any material extent.

Because of the affiliation and control of applicant with other motor carriers previously mentioned, the question of dual operations under section 210 of the Interstate Commerce Act arises. Applicant maintains records and personnel separate from the affiliated companies. The commodities are different and the equipment is not interchangeable. Dual operations were approved by the Commission in Nos. MC-11185 (Sub-No. 94), MC-11185 (Sub-No. 91), MC-11185 (Sub-No. 96) and MC-110077. Similar approval is warranted here as the existing situation would not be materially changed by the granting of the instant application.

The examiner finds that operation by applicant as a contract carrier by motor vehicle, in interstate or foreign commerce, over irregular routes, of aircraft assemblies, uncrated, requiring special handling and equipment because of the fragile nature thereof, from Indianapolis, Ind., to Wichita, Kans., will be consistent with the public interest and the national transportation policy; that applicant is fit, willing and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the rules and regulations thereunder; and that a permit authorizing such operation should be granted.

The examiner further finds that the holding of a permit by applicant and the holding of a certificate No. MC-110077 by Jack Cooper, Jr., and Thom Cooper, a partnership, doing business as J-T Transport Company, and the holding of a permit in No. MC-30884 by Jack Cooper Transport Company, Inc., will be consistent with the public interest and the national transportation policy.

It is recommended that the appended order be entered.

By Leo W. Cunningham, Examiner.

(Signature) LEO W. CUNNINGHAM

Recommended by Leo W. Cunningham, Examiner

(Signature) LEO W. CUNNINGHAM

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the day of A. D. 1957.

No. MC-11185 (Sub-No. 102)

J-T TRANSPORT COMPANY, INC., EXTENSION—INDIANAPOLIS, IND.

Investigation of the matters and things involved in this proceeding having been made, said application upon due notice having been heard by the examiner, who has made and filed a report herein containing his findings of fact and conclusions thereon, which report is hereby made a part hereof, and said proceeding having been duly submitted:

It is ordered, That upon full compliance with all requirements of sections 215 and 218 of the Interstate Commerce Act, with the rules and regulations thereunder, and with the requirements established generally and discussed at some length in *Contracts of Contract Carriers,* 1 M.C.C. 628, a permit be issued to applicant authorizing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle of the commodities described, and in the manner described, in the findings in said report.

It is further ordered, That the application in all other respects be, and it is hereby, denied.

And it is further ordered, That this order shall be effective on .

By the Commission, division 1.

HAROLD D. MCCOY,
Secretary

(SEAL)

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

Civil Action No. 1531

ELVIN L. REDDISH, *Plaintiff*

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*

CONTRACT CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC., *Intervening Plaintiff*

L. A. TUCKER TRUCK LINES, INC.
ORSCHELN BROS. TRUCK LINES, INC.
ARKANSAS-BEST FREIGHT SYSTEM, INC.
EAST TEXAS MOTOR FREIGHT LINES, INC.
GILLETTE MOTOR TRANSPORT, INC.
WESTERN TRUCK LINES, LTD.,
REGULAR COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC.,
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
AND 31 OTHER CLASS I RAIL CARRIERS IN WESTERN TRUNK LINE TERRITORY, *Intervening Defendants*

Before MATTHES, *Circuit Judge,* and MILLER and YOUNG, *District Judges.*

This opinion prepared by Judge Young and this day filed is hereby approved and adopted as the opinion of the Court, and pursuant thereto

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the orders of the Interstate Commerce Commission involved here be and are set aside as being unlawful and void, and the case is remanded to the Commission for further pro-

ceedings consistent with the views and rulings expressed in said opinion.

This October 19, 1960.

/s/ M. C. MATTHES
Circuit Judge

/s/ JNO. E. MILLER
District Judge

/s/ GORDON E. YOUNG
District Judge

Opinion

This is an action before a three-judge district court to enjoin and set aside orders of the Interstate Commerce Commission which denied plaintiff, Elvin L. Reddish, permanent authority to operate as a contract carrier by motor vehicle in interstate commerce. 28 U.S.C. §§ 1336, 1398, 2284 and 2321 through 2325 inclusive. By statute, the action is against the United States, represented by the Attorney General, while the Interstate Commerce Commission is made a party by right. 88 U.S.C. § 2323 (1958).

The Contract Carrier Conference of the American Trucking Associations, Inc., intervened before the Commission, and in this action on behalf of the plaintiff, the Commission is supported, in turn, by six common motor carriers, 32 railroads, and the Regular Common Carrier Conference of the American Trucking Associations, Inc., all of whom intervened before the Commission and in this action in opposition to the authority sought by plaintiff.

In its answer, the United States admitted all of the allegations of the complaint.[1] The United States filed a brief

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[1] Paragraph 12 of the complaint alleged: "The Orders of the Interstate Commerce Commission dated June 30, 1959 and December 16, 1959 are erroneous and void as a matter of law for the reason that they are arbitrary and capricious and without foundation in substantial evidence in the record considered as a whole."

in this Court in support of its position that the orders of the Commission should be set aside and the cause remanded for further proceedings. Counsel for the Government also appeared at the hearing and presented oral argument. In summary, the Government's position is that the Commission erred (1) in concluding that grant of the applicant would adversely affect the protesting carriers; (2) in concluding that denial of the application would not adversely affect the supporting shippers.[2]

The Interstate Commerce Commission, in its answer, denied that its action in denying plaintiff the permit he requested was unlawful, and stated that the action it had taken was fully supported and justified by the record.

The trial examiner of the Commission found that the service proposed by plaintiff would be consistent with the public interest and the national transportation policy, and recommended that the authority requested be granted. Division 1 of the Commission, however, denied the authorization requested although the trial examiner's findings of fact were adopted by the Commission as their own. The action of Division 1 was sustained by the full Commission, which held:

> "(a) that the findings of Division 1 are in accordance with evidence and the applicable law, and (b) that no sufficient cause appears, for reopening the proceeding for reconsideration or for oral argument."

This action was brought by plaintiff for judicial review of this denial by the Commission.

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[2] Encompassed in the second point is the contention that the Commission erred in treating as irrelevant the injury to supporting shippers caused by the higher cost of common carrier service; erred in concluding that the supporting shippers would not be adversely affected by withholding from them a contract-carrier service meeting transportation needs which the existing common carriers do not adequately meet.

There is no material dispute as to the facts. They are as follows:

Plaintiff requests permanent authority to operate as a contract carrier for Steele Canning Company and Cain Canning Company of Springdale, Arkansas, and for Keystone Packing Company of Fort Smith, Arkansas. He proposes to handle pooltruck shipments of less-than-truckload orders intended for delivery in 33 states, and to handle certain canning supplies on his return trips from 30 of these states. Steele Canning Company is the major shipper of the three that plaintiff proposes to serve. Steele normally purchases about 75% of the production of Cain and Keystone, which Steele in turn resells to the wholesale and retail market. Steele began transporting its own small order loads in 1948. This operation increased as Steele's small order business increased, until the fleet of trucks operated by Steele numbered 29 in January of 1958. Throughout this period Steele handled most of its truckload shipments by common carrier, principally Jones Truck Line, Inc. of Springdale, Arkansas, who supports the plaintiff's application to handle the less-than-truckload orders.

Steele's less-than-truckload orders account for approximately 80% of its business, which it transported almost exclusively by its own private carriage until June of 1958, when a labor dispute interfered with such operations. Steele at that time prompted plaintiff to apply for authority to handle this operation as a contract carrier. In June 1958 the Commission granted plaintiff temporary operating authority substantially as requested by him. The service rendered by plaintiff under such authority was found by the trial examiner to be substantially similar to the private carrier operations previously performed by Steele. The contract service rendered by plaintiff to Cain and to Keystone largely involves their sales to Steele, but both are interested in developing their own less-than-truckload business, which plaintiff would handle.

The three canners insist that the only satisfactory alternative to private carriage is contract carriage of the type plaintiff proposes to offer and which he has performed for them under temporary operating authority. Their business is intensely competitive and has a small margin of profit. Most small order accounts operate on small inventories, making it critical that their orders be filed promptly. Further, Steele has found that many of its customers have special unloading times and requirements which must be observed at risk of the loss of that business. Because of these facts and because of the scattered location of the small order customers throughout the 33 states named in plaintiff's application, these three canners insist that they would not be in a competitive position if forced to rely upon common carriers for delivery of less-than-truckload orders. Delays in "interlining" shipments, coupled with what the canners regard as "prohibitive" common carrier less-than-truckload rates, would, they say, place them at a disadvantage as to their competitors, who maintain their own fleets of trucks. The canners intend to abandon their private carriage operations and, in effect, use plaintiff as though he were their shipping department.

While the trial examiner found that some less-than-truckload shipments which require delivery stops for a portion of the freight at one or two points enroute to final destination had been satisfactorily handled by common carrier, the traffic that the three canning companies propose giving plaintiff involves from three to ten stops, with six stops being approximately the average less-than-truckload pooled shipment. This business had not in the past been handled by the protestant common carriers and, say the three shippers, will continue to be handled by private carriage if plaintiff's application is not granted, though the protestant common carriers insist that their experience indicates that they will receive some of this traffic if it is not handled by a contract carrier.

I

The limits of permissible judicial review of the order of the Interstate Commerce Commission here in question are determined by Section 10(e) of the Administrative Procedure Act. 60 Stat. 243 (1946), 5 U.S.C. § 1009(e) (1958). The appeal is upon the record made before the Commission and its order must be sustained if it is supported by substantial evidence when viewed on the record as a whole and if the action taken is within the scope of its lawful authority. *Universal Camera Corporation* v. *Labor Board*, 340 U.S. 474, 490 (1951). Plaintiff alleges that the order under review lacks substantive support for several findings and conclusions expressed by Division 1 in its report, and further alleges that the report applies a test not permitted by statute.

Our review of the record has convinced us that the plaintiff is correct in these contentions.

II

In declaring the national transportation policy, Congress included the following goals:

> ". . . to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices. . . ." 54 Stat. 899 (1949), 49 U.S.C., preceding § 1 (1958).

We need not decide whether contract motor carriers are a separate "mode" of transportation from common motor carriers to hold, as we do, that the goal of the national transportation policy encompasses all modes and all carriers subject to regulation.

A contract carrier by motor vehicle is defined by statute as:

> ". . . any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation . . . (other than common carriers), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer." 71 Stat. 411 (1957), as amended, 49 U.S.C § 303(a)(15) (1958).

The Commission found that plaintiff would fit this definition, but upon its review of the entire case concluded:

> "It is clear that authorization of a new carrier to transport traffic which common carrier protestant can efficiently handle would have an adverse effect upon the service of that protestant. *See J-T Transport, supra.*
>
> "There has been no convincing showing by applicant that the supporting shippers have a real need for the proposed contract carrier service. On the contrary, the only serious complaint which shippers have against existing service is with the less-than-truckload rates of motor common carriers. Even should the application be granted, they assert, they will continue to use common carrier service to some extent. It may be fairly concluded, we believe, that their support of this application rests entirely upon a desire to obtain lower rates. This is not a sufficient basis to justify a grant of authority to a new carrier. If the shippers believe that the rates of presently authorized carriers are unjust or unreasonable, they should seek relief in actions against these carriers under appropriate provisions of the act. Under the circumstances, the application will be denied."

The applicable section of the Interstate Commerce Act provides:

"Subject to . . . (the provision against holding both a common carrier certificate and a contract carrier permit), a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this chapter and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act; otherwise such application shall be denied. In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act, the Commission shall consider (1) the number of shippers to be served by the applicant, (2) the nature of the service proposed, (3) the effect which granting the permit would have upon the services of the protesting carriers, (4) the effect which denying the permit would have upon the applicant and/or its shipper and (5) the changing character of that shipper's requirements." 71 Stat. 411 (1957), 49 U.S.C. § 309(b) (1958).

There is no contention that plaintiff has not demonstrated his fitness and ability to meet the first two requirements for the issuance of a permit, and as is said in the Commission's opinion, the fifth matter for consideration is not involved. As shown above, the Commission found that the granting of the permit would have an adverse effect upon the protesting common carriers because such carriers could efficiently handle the business, and there was no adequate showing that the supporting shippers had a real need for the proposed service. Thus, the third and fourth criteria enumerated in the act are the only ones involved, and it is upon these conclusions that the Commission denied plaintiff a permit as not being consistent with the public interest and the national transportation policy.

The statutory enumeration of factors for Commission consideration in determining consistency with the public interest and national transportation policy specifically includes the effect that a denial of the permit would have upon the supporting shippers, but as interpreted by the Commission.

> "... whether the shippers would be adversely affected by a denial must depend upon a determination of whether existing service is adequate to meet their transportation requirements . . ."

We find no authority for limiting the inquiry as to the effect of a denial of a permit to a mere inquiry as to the adequacy of presently available service. Indeed, as applied by the Commission in this case, there is no distinction between this test and the test of proving public convenience and necessity that must be met by applicants for a common carrier certificate.

Considering all of the record, including the evidence of the lower cost of plaintiff's proposed service, it is clear that substantive evidence does not support the Commission's finding that the supporting shippers will not be adversely affected by a denial of this application; the record, the findings of the examiner, and the specific findings of fact stated by Division 1 in its report all indicate the contrary—the alternative faced by the shippers if the application is denied is the operation of their own trucks, in substantial numbers, in private carriage; common carriers are not an adequate substitute, and for that reason are not utilized. It does not do to say that the record is devoid of any substantial showing of dissatisfaction by the shippers with existing service because the complaints are not substantiated by reference to specific instances, or to hold that the shippers failed to show that they had been unable to obtain reasonably adequate service upon request because existing common carriers, other than Jones, had been almost completely untried in recent

years. The record clearly reveals that the shippers, particularly Steele Canning Company, are reasonably familiar with the services, including less-than-truckload rates, of the protestant carriers, and have not used them for the traffic in question because these services are inadequate.

Further, the "adequacy of existing service" test as applied by the Commission in this case in its determination of the effect upon supporting shippers of a denial of the permit is a test proscribed by the legislative history of the Interstate Commerce Act. In 1957 the Commission proposed to Congress several changes in the Act to enable it to better regulate contract carriers. As proposed, § 203 (a)(15) of the Act (49 U.S.C. § 303(a)(15)) would have defined the term contract carrier by motor vehicle as meaning:

> ". . . any person which engaged in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation . . ., under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer and not provided by common carriers."

Section 209(b) (49 U.S.C. § 309(b)) would have been changed to insert the requirement "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." The amendment of the Interstate Commerce Act does not contain such language, however, and as amended by Public Law 85-163, 71 Stat. 411, the two sections read as previously quoted in this opinion.

Our study of the legislative history of this Act convinces us that the deletion of the willingness and ability test was at the specific protest of the contract carriers, some of their supporting shippers, the Department of Commerce and the Department of Justice. In its place were substituted the five specifications of items to be considered

by the Commission in determining whether the requested permit would be consistent with the public interest and the national transportation policy, and to this change the Interstate Commerce Commission expressed its approval. S. Rep. No. 703, 85th Cong., 1st Sess. (1957) (Report of Senate Committee on bill which became Public Law 85-163, 71 Stat. 411). See *J-T Transport Co., Inc., Extension—Columbus, Ohio,* 79 M.C.C. 695, 711 (Concurring opinion, Walrath, Commissioner) (1959).

We do not believe that there is any difference between the "willingness and ability" test deleted by Congress from the bill proposed by the Commission and the "adequacy of service" test which the Commission said it applied in this case—a separate test, it maintains, from the one deleted. We believe that the Commission's own opinion in this case shows that it did apply the "willingness and ability" test:

> "Applicant argues in his reply (referring to the 1957 amendments) that the willingness and ability of common carriers to provide needed service should be given but little weight in determining whether an application for contract-carrier authority should be granted. Similar contentions were considered by the entire Commission in No. MC-11185 (Sub.-No. 100) *J-T Transport, Inc., Extension—Columbus, Ohio, M.C.C.,* decided June 15, 1959; these issues were there resolved in a manner contrary to that urged by applicant; and it was found that the availability of common carrier service is a relevant matter which must be considered in disposing of contract carrier applications."

The decision of the Commission in the J-T Transport, Inc. case was attacked in a proceeding instituted by that applicant in the district court for the Western District of Missouri, Western Division, in the case of *J-T Transport Co., Inc.* v. *United States of America and Interstate Commerce Commission.* The three-judge court in that case handed down its opinion August 9, 1960, Fed. Supp. , setting aside the order of the Commission for wrongfully

applying the new criteria prescribed by the 1957 amendment to the Interstate Commerce Act. This case was one of first impression in construing the new status of an applicant for a permit as contract carrier when opposed by common carriers on the ground that adequate service was already available by common carrier. In that case, the court discusses exhaustively the legislative history of the 1957 amendments and concludes at page of Fed. Supp.

> "The Commission bases its decision here on the presumption that if an existing common carrier is able and willing to perform services for the shipper or, stated alternatively, that existing service is adequate, the effect on existing protesting common carrier services is adverse. . . . The effect of this is to inject precisely the standard which was deleted by Congress at the time of enactment of the new section."

In this case, the only evidence of the adequacy of existing service to meet the transportation requirements of the supporting shippers came from the testimony of common carriers that they were willing and able to serve, though they had not been called upon by the shippers to do so in recent years as to the traffic in question; all the other testimony was to the effect that the existing service was considered inadequate by the shippers.

We do not believe that it was the intent of Congress that the approval or disapproval of an application for a contract carrier permit should be determined solely by reference to whether or not the proposed service is provided by common carriers, or one which they are unwilling or unable to provide. Sufficient tests and safeguards to control the granting of contract carrier permits are contained in the law to protect common carriers without the imposition by the Commission of a test which Congress deemed improper.

As the Court said in overruling the Commission in the *J-T Transport case:*

> "Thus, in weighing these various factors, one against the other, we reach the conclusion that even though the Commission may find that issuance of a permit will in fact adversely affect a protesting carrier, that in and of itself does not necessarily justify a denial of the permit. The statute does not say, 'The permit shall be issued, unless an existing carrier will be adversely affected.' It does set out clearly and concisely the standards by which the Commission must be guided, and there is no longer a need to resort to special tests beyond the language of the statute, which may have been necessary in making determinations prior to the amendments. The five criteria in Section 209(b) are broad and inclusive, and when given proper application, in light of the evidence, the Commission should, without the injection of other factors, be able to make a proper distribution of the application."

III

Neither do we believe that lower costs in the form of rates may be ignored in determining the effect denying the permit would have upon the shippers. Congress has declared one of the goals of our national transportation policy is to promote "economical" service.

We are not to be understood as saying that evidence of lower rates is always important, or determinative, when weighing evidence in support of a contract carriage application against that presented by protestant common carriers. Our holding is that where the lower rates result from economies and advantages inherent in contract carrier operation, as they do in this instance, and there is a showing that efficient business operation requires the proposed tailored service—including the lower rates, as is reflected by the record in this instance, the Commission may not disregard this evidence in its evaluation of the effect of a denial of the permit upon the applicant's supporting shippers. Mere cost-cutting or profit-shaving need

not be considered perhaps, but evidence of efficient operation must be heeded.

IV

In considering the effect which granting of the permit would have upon the services of the protesting carriers, the Commission concluded, as heretofore stated, that the authorization of a new carrier to transport traffic which common carrier protestants could efficiently handle would have an adverse effect upon the service of such common carriers.

Whatever the validity of this presumption generally, it is overcome in this case by the evidence in the record, which establishes, we think, not only that the protestant common carriers have not handled this traffic but would not handle it if the permit were denied.

Even if it is assumed that some adverse effect would result from the granting of this permit, no consideration was given to the special services which could not be supplied by a common carrier. As the Court said in the *J-T Transport* case:

> "... a finding by the Commission that existing common carrier service is 'adequate to meet the reasonable transportation needs' of the shipper fails to take into account that the new test under Section 203(a)(15) is whether the service is 'designed to meet the *distinct need* of each individual customer.' While existing *specialized services* of common carriers may very well be adequate to supply the shipper's '*reasonable transportation needs*', that existing service may not in fact meet the distinct or specific need of the supporting shipper."

V

The orders of the Interstate Commerce Commission dated June 30, 1959 and December 16, 1959 in proceeding number MC-117391 shall be set aside and their enforcement enjoined. The cause is remanded to the Interstate Commerce

Commission for such further proceedings in conformity with this opinion as may be proper.

APPENDIX "C"

Decision

INTERSTATE COMMERCE COMMISSION

No. MC-117568

TAM FERTILIZER CARRIERS, INC., CONTRACT CARRIER APPLICATION

Decided December 7, 1960

Upon reconsideration, findings in prior report, M.C.C. , decided May 11, 1959, affirmed. Operation by applicant as a contract carrier by motor vehicle, over irregular routes, of specified commodities from and to certain points and areas in nine States for named shippers found to be consistent with the public interest and the national transportation policy. Issuance of a permit approved upon compliance by applicant with certain conditions, and application in all other respects denied.

Appearances as shown in the prior report.

REPORT OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

By application filed August 6, 1958, as amended, Tam Fertilizer Carriers, Inc., of Corning, Ark., seeks a permit authorizing operation, in interstate or foreign commerce, as a contact carrier by motor vehicle, over irregular routes, in a service restricted against the use of tank vehicles, and further restricted to transportation on behalf of Ark-Mo Plant Food Company, Inc., of Walport, Ark., Missouri Plant Food Company, Inc., of Sikeston, Mo., and Blytheville Plant Food Company, Inc., of Blytheville, Ark., hereinafter

called Ark-Mo, Missouri Food, and Blytheville Food, respectively, of (1) fertilizer and fertilizer materials and compounds (a) from Walport (near Walnut Ridge, Ark.,) to points in Illinois, Tennessee, Mississippi, Louisiana, Texas, New Mexico, Kentucky, and Missouri, (b) from Blytheville to points in Tennessee and Missouri, (c) from Sikeston to points in Illinois, Tennessee, Kentucky, and Arkansas, and (d) from Pascagoula, Miss., to points in Tennessee, Texas, New Mexico, and Arkansas; (2) potash from points in New Mexico to Pascagoula and points in Arkansas and Missouri; (3) ammonium nitrate, ammonium sulphate, phosphates, mixed fertilizers, and nitrate of soda, in bulk, (a) from Memphis, Tenn., Caruthersville, Mo., Cairo, Ill., and points in Mississippi to Walport, Blytheville, and Sikeston, and (b) from the port of Harlingen, Tex., to points in Texas; (4) ammonium sulphate (a) from points in Kentucky to Walport and Sikeston, and (b) in bulk from Fredericktown, Mo., to Walport; (5) nitrate of soda from points in Louisiana to Walport and Blytheville; (6) bags (a) from St. Louis, Mo., to Walport and (b) from points in Arkansas to Sikeston; and (7) agricultural insecticides from points in Texas, Louisiana, Mississippi, and Tennessee (except Knoxville), to Walport. L. A. Tucker Truck Lines, Incorporated, East Texas Motor Freight Lines, Inc., Herrin Transportation Company, Jones Truck Lines, Inc., Gordon Hart Truck Lines, and Be-Mac Transport Company, Inc., and certain rail carriers oppose the application.

In the prior report herein, M.C.C. , decided May 11, 1959, Division 1 found that operation by applicant, as a contract carrier by motor vehicle, substantially to the same extent set forth in our findings below, would be consistent with the public interest and the national transportation policy, and authorized the issuance of a permit to applicant. On December 30, 1959, upon consideration of the record herein, of a joint petition of rail carriers, and of

a reply by applicant, we reopened the proceeding for reconsideration on the present record.

In their petition rail carriers ask that any authority granted applicant be limited to outbound service from shippers' plants to off-rail points, arguing that all three plants herein are served by rail carriers which have, over the years, satisfactorily handled nearly all of the inbound fertilizer materials thereto. They further contend that the authority granted in the prior report is inconsistent with the position of the supporting shippers which state (1) that rail carriers will continue to handle 85 percent of their inbound traffic, and (2) that their real need for service concerns the transportation of fertilizer to off-rail points such as farm-sites during the planting season. In reply applicant points out that none of the motor carrier protestants filed petitions and concludes therefrom that their interest in this traffic is minimal. It argues that it was organized by shippers for the express purpose of engaging in the operations which they previously performed themselves; that none of shippers' outbound traffic moves directly to rail points; that, in any event, the rails will continue to participate in this traffic to the same extent they have in the past; and that little or no traffic will be diverted from existing carriers if this application is granted. It urges that the application be granted to the extent set forth in the prior report. The facts of record are set forth adequately in the prior report but will be restated here to the extent necessary for a clear understanding of the issues raised on petition.

Applicant is a recently-formed corporation organized by the supporting shippers which are themselves commonly controlled. It holds no authority from this Commission. Prior to the organization of applicant, each shipper herein operated in private carriage transporting the products which it manufactures as well as the commodities in which it deals. On occasion, each performed some transportation

service for the others, but such operations were discontinued upon notification by our field representative that these operations required authority. As a consequence of this cessation of operations, shippers were without motor service, and organized applicant to provide the service that they themselves had been providing. Specifically, the purpose of this application is to provide shippers with an outbound motor service for the delivery of manufactured products, and to furnish these companies with an inbound service transporting raw materials. In the outbound service, fertilizer, fertilizer materials, and fertilizer compounds will move to shippers' dealers and customers, and in the inbound service movement will be mainly from places of manufacture of the various fertilzer ingredients to the three plants here considered. If this application is granted, shippers will assign to applicant certain motor equipment they presently own as a part of their contribution to its capital assets. If the application is denied, they intend to continue their private carriage operations because they believe that it is essential that they control the deliveries to the customers. As the fertilizer business grows, applicant intends to purchase additional equipment as necessary, but in any event will exclusively dedicate equipment to the use of the supporting shippers herein.

Ark-Mo, Missouri Food, and Blytheville Food support the application. The first two are engaged in the manufacture, sale, and distribution of fertilizer, fertilizer materials, and fertilizer compounds, whereas Blytheville Food is engaged only in the warehousing, sale, and distribution of these commodities. They all have customers throughout the considered destination area to whom they ship substantial volumes of fertilizer and fertilizer compounds from their plants at Sikeston and Walport, and from facilities at Blytheville, Pascagoula, and Harlingen. For the most part these customers are individual farmers or commercial dealers, and shippers express a need for service, principally but not limited to farm sites and off-rail points, on short

notice, during the annual planting season, and to a lesser extent during the remainder of the year. Such service has been available heretofore from their recently discontinued private carrier operations, and they support applicant here in the anticipation of having available a for-hire carrier offering the same type of service. Shippers point out that because of the competitive nature of their business, reliable motor carrier service is essential to enable them to effectively cope with their competitors which may have such service available to them, and add that they have found from experience that their sales are in direct proportion to the speed and dependability of the service they can provide. On outbound traffic shippers have made no use of rail carriers. They cited one instance where an unspecified motor common carrier was unable to provide as rapid a service as they desired on an outbound movement. While they admit that they are not wholly familiar with the services offered by all of the existing motor carriers, shippers are convinced that these carriers are not in a position to provide the service needed, and in fact believe that many of them would actually turn down this traffic were it offered them.

Inbound, shippers seek a motor carrier service to supplement the available rail services which would continue to handle much of this traffic, in the transporation of raw materials and ingredients used in the manufacture of fertilizer. They point out that the return movements proposed by applicant in the transportation of ingredients and raw materials would be a continuation of their own past practices in private carrier operations.

The opposing motor carriers are general-commodity carriers which operate over networks of regular routes in the area under consideration. Their authority is detailed in the prior report and will not be repeated here. It is sufficient to say that they are willing and anxious to handle this traffic to the extent of their authorities, but generally are of course limited to service at points along their routes.

The St. Louis-San Francisco Railway Company provides service to the plant sites at Blytheville, Walport, and Sikeston, and interlines with other rail carriers serving origins and destinations here involved. The Illinois Central Railroad Company has participated in handling inbound traffic to Walport and Sikeston, and The Atchison, Topeka and Santa Fe Railway Company has handled an appreciable tonnage of potash originating in New Mexico and destined to points in Missouri and Arkansas. The rail carriers fear that a grant of authority here will divert traffic from them and further decrease their depleting revenues.

The evidence discloses that applicant, while it will dedicate its equipment to the exclusive use of the three supporting shippers rather than to that of each shipper, will provide a service meeting the distinct needs of these shippers. Thus, it appears that applicant's proposed operations are those of a contract carrier as defined in section 203(a)(15) of the Interstate Commerce Act, as amended. However, an applicant for authority as a contract carrier is entitled to a grant of authority only upon our finding that its proposed operations will be consistent with the public interest and the national transportation policy. In making such a determination, we are required to give consideration to, among other things, the following factors enumerated in section 209(b) of the act, as amended: (1) The number of shippers to be served by applicant, (2) the nature of the service proposed, (3) the effect of a grant of authority on the services of protesting carriers, (4) the effect of a denial on applicant and its shippers, and (5) the changing character of the shipper's requirements.

Bearing these factors in mind, we note that we have here a situation wherein an applicant, a recently organized corporation, is seeking to provide for three supporting shippers a service which the latter provided in the past in private carriage operations. These shippers, which com-

monly control applicant, and are themselves under common control, are engaged in the sale, distribution, or manufacture of various fertilizers and fertilizer compounds, and not only require the services of a carrier to move their output to consumers, but also require an inbound service to handle the ingredients used in the manufacture of fertilizer. On their outbound traffic shippers require the services of a carrier which can meet their complete needs by furnishing equipment immediately on short notice and by providing farm site or store-door deliveries. Protestants, being regular-route motor common carriers or rail carriers, cannot respond to this need particularly as to the destination points which may be off their routes. Furthermore, they have not participated in this outbound traffic in the past and thus will not be adversely affected by a grant of operating authority herein. Inbound, rail carriers have been used on much of this freight, and will continue to be used as extensively as heretofore. As on the outbound traffic, protesting motor carriers cannot provide the needed service, because of the territorial limitations in their certificates and they have not participated in the movement of this freight in the past. It is clear then, that what shippers need is a service to supplant that provided in the past by private carriage in the transportation of raw materials and ingredients employed in the manufacture of fertilizer and fertilizer compounds. Thus it is plain that shippers' requirements are for a transportation service closely integrated with their operations and one which would be closely akin to the private carriage operations heretofore used. In the circumstances here, the close relationship between shippers and applicant is not objectionable, for the proposed service is that of a contract carrier. The very nature of such service, as well as that herein, contemplates a personalized and dedicated service by a carrier for a shipper or limited number of shippers and a concomitant close relationship between shipper and carrier. We, therefore, are of the opinion that applicant should be permitted

to provide the proposed service to the extent authorized in the findings below.

There remains another matter. During the time that the supporting shippers were engaged in so-called "private" carrier operations, they performed certain unauthorized transportation by providing service for each other. These operations were, in our opinion, performed in ignorance of and without any intent to disregard the provisions of the Interstate Commerce Act or our rules and regulations, and thus do not warrant a denial of the application or a negative finding as to applicant's fitness. Applicant is admonished to become fully acquainted with our rules and regulations, to abide by them, and to refrain from providing any service not authorized by its outstanding authority.

On reconsideration, we find that operation by applicant, in interstate of foreign commerce, as a contract carrier by motor vehicle, over irregular routes, under a continuing contract or contracts with persons (as defined in section 203(a)(1) of the Interstate Commerce Act) hereinafter named, for the transportation of commodities, except in tank vehicles, as follows:

A. With Ark-Mo Plant Food Company, Inc., of Walport, Ark.,

(1) of fertilizer and fertilizer materials and compounds from Walport, (near Walnut Ridge), Ark., to points in Illinois, Tennessee, Mississippi, Louisiana, Texas, New Mexico, Kentucky, and Missouri;

(2) of ammonium nitrate, ammonium sulphate, phosphates, mixed fertilizers, and nitrate of soda, in bulk, from Memphis, Tenn., Caruthersville, Mo., Cairo, Ill., and points in Mississippi to Walport, Ark.,

(3) of ammonium sulphate,

(a) from points in Kentucky to Walport, Ark.;

(b) in bulk, from Fredericktown, Mo., to Walport, Ark.;

(4) of nitrate of soda from points in Louisiana to Walport, Ark.; and

(5) of agricultural insecticides from points in Texas, Louisiana, Mississippi, and Tennessee (except Knoxville), to Walport, Ark.;

B. With Missouri Plant Food Company at Sikeston, Mo.,

(1) of fertilizer and fertilizer materials and compounds from Sikeston, Mo., to points in Illinois, Tennessee, Kentucky, and Arkansas;

(2) of ammonium nitrate, ammonium sulphate, phosphates, mixed fertilizers, and nitrate of soda, in bulk, from Memphis, Tenn., Caruthersville, Mo., Cairo, Ill., and points in Mississippi, to Sikeston, Mo.; and

(3) of ammonium sulphate from points in Kentucky to Sikeston, Mo.;

C. With Blytheville Plant Food Company, Inc., of Blytheville, Ark.,

(1) of fertilizer and fertilizer materials and compounds from Blytheville, Ark., to points in Tennessee and Missouri;

(2) of ammonium nitrate, ammonium sulphate, phosphates, mixed fertilizers, and nitrate of soda, in bulk, from Memphis, Tenn., Caruthersville, Mo., Cairo, Ill., and points in Mississippi to Blytheville, Ark.; and

(3) of nitrate of soda from points in Louisiana to Blytheville, Ark.; and

D. With Ark-Mo Plant Food Company, Inc., Missouri Plant Food Company, Inc., and Blytheville Plant Food Company, Inc.,

(1) of fertilizer and fertilizer materials and compounds from Pascagoula, Miss., to points in Tennessee, Texas, New Mexico, and Arkansas;

(2) of potash from points in New Mexico to Pascagoula, Miss., and points in Arkansas and Missouri; and

(3) of ammonium nitrate, ammonium sulphate, phosphates, mixed fertilizers, and nitrate of soda, in bulk, from the Port of Harlingen, Tex., to points in Texas,

will be consistent with the public interest and the national transportation policy; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and our rules and regulations thereunder; that a permit authorizing such operations should be granted; and that the application in all other respects should be denied.

Upon compliance by applicant with the requirements of sections 215, 218, and 221(c) of the Interstate Commerce Act, with our rules and regulations thereunder, and with the requirements established in *Contracts of Contract Carriers*, 1 M.C.C. 628, within the time specified in the order entered concurrently herein, an appropriate permit will be issued.

An appropriate order will be entered.

COMMISSIONER FREAS, whom COMMISSIONERS TUGGLE, MURPHY and HERRING join, dissenting:

In my opinion, the instant application is an attempt by three private carriers to invade the field of for-hire transportation in a manner inconsistent with the public interest in the maintenance of a strong public transportation system. While there can be no objection to bona fide private carriage by each shipper, a grant would constitute a device whereby these commonly controlled shippers would deprive the rails of some inbound traffic in order to insure

profitable outbound operations for each other. Rail service has proven satisfactory and shippers are admittedly unfamiliar with the services offered by all the existing motor carriers. I would deny the application.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 7th day of December, A. D. 1960.

No. MC-117568

TAM FERTILIZER CARRIERS, INC., CONTRACT CARRIER APPLICATION

It appearing, That on May 11, 1959, the Commission, division 1, made and filed its report, M.C.C. , in the above entitled proceeding, granting applicant authority to conduct certain operations in interstate or foreign commerce as a contract carrier by motor vehicle, and denying the application in all other respects;

It further appearing, That upon consideration of the record, of a joint petition for reconsideration filed by rail protestants, and of applicant's reply thereto, by order of December 30, 1959, the proceeding was reopened for reconsideration on the present record;

It further appearing, That reconsideration of the matters and things involved has been given, and that the Commission, on the date hereof, has made and filed a report on reconsideration herein containing its findings of fact and conclusions thereon, which report and the said report of May 11, 1959, are hereby referred to and made a part hereof:

It is ordered, That said application, except to the extent granted in the said report on reconsideration, be and it is hereby, denied.

And it is further ordered, That, unless compliance is made by applicant with the requirements of Sections 215, 218, and 221(c) of the Interstate Commerce Act within 90 days after the date of service hereof, or within such additional time as may be authorized by the Commission, the grant of authority made in said report on reconsideration shall be considered as null and void, and the application shall stand denied in its entirety effective upon the expiration of the said compliance time.

By the Commission.

HAROLD D. McCOY,
Secretary.

(SEAL)